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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

BY E. C. EBERSOLE,
REPORTER.

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W.F.

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PREFACE.

IN the preparation of this volume, no effort has been made to depart from the long established and well approved plan of the Iowa Reports.

In former volumes, all cases determined at the Davenport, Dubuque and Council Bluffs terms were referred to the next term of the court held at Des Moines, so that we have the chronological absurdity of a case determined in March, for example, at Council Bluffs, under the title of cases determined at the June term at Des Moines. This custom doubtless grew out of the fact that the terms held elsewhere than at the capital were once only "argument" terms. But as these terms are now, as they long have been, of equal dignity with those held at Des Moines, they have received equal recognition in this volume, and each case has been referred to the place and term at which it was actually determined.

Knowing very well that the value of a law book depends almost wholly upon the facility and certainty with which one can learn what it does and does not contain, I have spared no pains to make the index and the head notes accurate and exhaustive. But in this, as in every other vocation, experience is necessary to the best results; and, aided in the future by the experience of the past, I shall hope to make each succeeding volume better than its predecessor.

I am greatly indebted to the several judges of the court for their valuable suggestions and for their encouraging commendation of my work.

E. C. E.

TOLEDO, IOWA, *September 1, 1883.*

JUDGES AND OFFICERS OF THE SUPREME COURT
AS AT PRESENT CONSTITUTED.

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" JOSEPH M. BECK, Fort Madison,
" AUSTIN ADAMS, Dubuque,
" WILLIAM H. SEEVERS, Oskaloosa, } Judges.

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E. C. EBERSOLE, Toledo.

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AT THIS DATE.

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CHARLES H. PHELPS, Circuit Judge.
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C. F. LOOFBOUROW, Circuit Judge.
14TH DISTRICT.. ED. R. DUFFIE, District Judge.
JOHN N. WEAVER, Circuit Judge.

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REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
DES MOINES, JUNE TERM, A. D. 1882.

IN THE THIRTY-SIXTH YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS, } JUDGES.

50	11
61	568
59	11
138	143

MUSSER & PORTER v. MAYNARD ET AL.

1. **Practice: JURY BOUND BY INSTRUCTIONS OF COURT.** The instructions to the jury constitute the law of the case, and must be followed by the jury, whether right or wrong.

Appeal from Cedar District Court.

WEDNESDAY, JUNE 14.

ACTION at law upon a sheriff's official bond to recover damages for an alleged failure to make the money on a certain execution, issued upon a judgment in favor of plaintiffs

Musser & Porter v. Maynard.

and against Theodore Pearson and Alexander Pearson. There was a trial by jury, which resulted in a verdict and judgment for defendants. Plaintiffs appeal.

Baker & Ball and *John N. Neiman*, for appellants.

Wolf & Landt and *Piatt & Carr*, for appellees.

ROTHROCK, J.—This is the second appeal in this case. See 55 Iowa, 197. Upon the last trial it appeared that the sheriff received the execution in question on the 21st day of August, 1877. He stated in his testimony as a witness that on the 24th day of the same month he made a levy on certain growing corn, the property of Theodore Pearson, subject to a mortgage which was represented to be upon it, and subject to what he (Pearson) claimed was exempt from execution for his stock and family. This corn was cultivated by Pearson upon the farm of one Heppenstall, and the evidence shows that Pearson was not in possession of the farm, but that it was in possession of Heppenstall, who was entitled to one-third of the corn as rent. The court in the fifth instruction to the jury directed them in substance that if there was any more corn than was exempt from execution it was subject to be levied on and sold to satisfy judgments against the owner, "and it was the duty of the sheriff in the exercise of diligence to levy on and sell said property, and if he failed to exercise such reasonable diligence as heretofore set forth, he is liable" and the verdict should be for the plaintiffs.

"2. If you find from the evidence that the defendant, A. B. Maynard, then sheriff, did on the 24th day of August, 1877, make a levy under the execution then in his hands in the case of *Musser & Porter v. Theodore and Alexander Pearson*, on the interest of Theodore Pearson in the field of corn on George Heppenstall's farm, and afterwards neglected to sell said property, and apply the proceeds upon his execution, but negligently suffered it to be disposed of by the defendants and other parties for other purposes, then you are

Musser & Porter v. Maynard.

instructed that defendant is liable to plaintiffs for the value of Theodore Pearson's share of said corn, less the amount of his exemption."

If the jury had followed these instructions of the court, they could not have done otherwise than render a verdict for plaintiffs.

All the evidence shows that there was more corn in the field than what was exempt. The jury were told that Pearson's interest, not exempt, was subject to the levy of an execution and that it was the duty of the sheriff to make the levy, and they were further told that if he did make the levy, and negligently suffered his levy to be lost by allowing the property to be disposed of to others, he was liable.

We have no occasion to determine the correctness of these instructions. We are not called upon to decide whether, or not, the sheriff was bound to levy upon the corn, if the jury should find he received such notice, that it was covered by a chattel mortgage as to deter him in the exercise of reasonable diligence from making the levy; nor the effect of a levy subject to a chattel mortgage; nor the right of the sheriff to abandon the levy if he afterwards, as a prudent person, believed it would be unavailing; nor as to his right to make the levy and sell the corn while growing and in the possession of Heppenstall, the owner of an undivided one-third thereof.

The door to all these inquiries is closed by the above instructions. It is not our province in the present *status* of the case to determine the correctness of these instructions. They should have been followed by the jury. It has been repeatedly held by this court, that the instructions to the jury constitute the law of the case, and must be followed by the jury, whether right or wrong. *Savory v. Busick*, 11 Iowa, 487; *Farley, Norris & Co. v. Budd*, 14 Iowa, 289, *et seq.*; *Taylor v. Cook*, Id., 501, and other cases.

The verdict of the jury should have been set aside as contrary to the instructions of the court.

REVERSED.

Cummings v. Wilson.

CUMMINGS V. WILSON ET AL.

59 14
117 68

59 14
119 233

1. **Tax Sale: REDEMPTION: TIME OR.** Redemption may be made from a tax sale at any time within ninety days after the proof of service of the notice required by section 694 of the Code has been filed in the proper office.
2. **— : — : WHO MAY REDEEM.** In cases wherein the proper county officers are authorized and required to permit redemption, the courts will allow and enforce the right; and it is the rule in this State that the holder of any right in lands, legal or equitable, perfect or inchoate, may redeem from a tax sale.
3. **— : — : DUTY OF OFFICERS.** When one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, which the law provides shall support the right of redemption, the county officers must permit the redemption, if they are satisfied that he in good faith relies upon such equity or claim; but such equity or claim must pertain to an interest in the land, and be such that, if enforced, it will vest some title, lien or right to the property itself.
4. **— : — : — .** In this case, where it appears that the plaintiff was prosecuting his suit to recover the title to the land in controversy, basing his claim upon an equity which, if established, would entitle him to the relief he sought, *held* that he was entitled to redeem from a sale of the land for taxes.

Appeal from Wapello Circuit Court.

WEDNESDAY, JUNE 14.

ACTION in chancery to quiet the title of certain lands in plaintiff. After the filing of the petition the defendants conveyed their interest and claim in the land to plaintiff, and Houston filed a petition of intervention showing that he is the holder of a certificate of purchase of the land at tax sale and that he is entitled to a tax deed, which the treasurer refuses to execute. He alleges that the time for redemption has expired and asks that plaintiff be denied the right to redeem from the sale. There was a decree granting the relief prayed for by plaintiff and dismissing the petition of the intervenor, who now appeals to this court.

Cummings v. Wilson.

W. M. Walker, for appellant.

W. H. C. Jaqueson, for appellee.

BROCK, J.—I. The material facts of the case are as follows:

1. August 6th, 1877, the intervenor's assignor purchased the land at tax sale.

2. On the 12th of May, 1880, the intervenor published the notice required by Code, § 894, preliminary to the execution of a tax deed.

3. March 17th, 1881, proof of service of the notice was filed in the proper county office.

When the land was sold for taxes the legal title, which some time before he had held, was not in the plaintiff, but he had an equity therein, based upon the ground that the deed was not to be delivered until the consideration was paid, and its delivery had been procured by fraud.

5. March 2d, 1880, the plaintiff commenced this suit against defendants, the holders of the legal title to the lands, to recover the title and quiet it in himself.

6. July 26th, 1880, he paid the county Auditor the amount required to redeem from the tax sale as shown by that officer's books.

7. March 15th, 1881, the plaintiff filed for record a quit-claim deed from defendants for the land, executed the same month, but the day is not shown.

8. Upon these facts we are required to determine whether plaintiff has lawfully redeemed the land from the tax sale under which the intervenor claims that he is entitled to a tax deed.

II. The court has held that redemption may be made within ninety days after the proof of service of the notice re-

1. **TAX SALE:** required by Code, § 894, is filed in the proper **redemption:** **time of** office. *Swope v. Prior*, 58 Iowa, 412. Plaintiff made the redemption before the filing of the proof of service; it was therefore in time.

III. Was the redemption made by plaintiff before the exe-

Cummings v. Wilson.

cution to him of the quitclaim deed by the defendants sufficient? Did he at that time have such an interest in the land as conferred upon him the right to redeem from the tax sale?

Before the redemption plaintiff had brought this suit setting up his equity in the land and claiming to recover the title. Subsequently he acquired, by compromise, or otherwise, the interest claimed by defendants. It cannot, we think, be doubted that the law will regard him as holding an equity in the property. It is not important to determine the nature or extent of his equity, and indeed, we think, that we need not determine that he held a claim to the land which equity or the law would enforce. It is sufficient to know that he, in fact, claimed an equity and was in good faith attempting to enforce it. This position is supported by the following considerations. It is very plain that in cases wherein the county officers are authorized and required to permit redemption, the courts will allow and enforce the right. These officers are charged with the duty of administering the law in such cases. It cannot be possible that in a case wherein they would be required to permit redemption, the courts would deny the right. If this were so, there would arise a conflict between these officers and the courts, both appointed instruments for the administration of the law. But this the law will not permit. We conclude, therefore, that if the county auditor and the treasurer were authorized in this case to permit plaintiff to redeem, this court must enforce the right.

IV. It is the rule of this State that the holder of any right in lands, legal or equitable, perfect or inchoate, may redeem from a tax sale. *Rice v. Nelson*, 27 Iowa, 148; *Byington v. Bookwalter*, 7 Id., 512; *Adams v. Beale et al.*, 19 Id., 61.

V. The right of one claiming to redeem, may depend upon facts which rest upon parol testimony, or upon the construction of written instruments, and difficult questions of law may be involved therein. In-

Cummings v. Wilson.

deed, this is usually the case where such claims are based upon equities or are not supported by plain and undisputed record titles. How are such claims to redeem to be determined by the county officers? How are they to determine the question of fact and of law involved therein? It is plain that they cannot decide these questions for the reasons that they cannot exercise judicial functions, and the decision of such questions, where they are to be decided, are by the law always remitted to the courts. We conclude that when one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, which the law provides shall support the right of redemption, the county officers must permit the redemption if they are satisfied he, in good faith, relied upon such equity or claim. They are not to determine whether the law will enforce his claim, but whether in good faith he makes it. It will, of course, be understood the claim or equity must pertain to an interest in the land which, if enforced, will vest some title, lien or right to the property itself. If this rule be not recognized county auditors must exercise important judicial functions or the right of redemption must be restricted to persons holding the undisputed record title to the land. But this the law will not do.

VI. In the case before us the plaintiff, when he paid the money to redeem the land in controversy, was prosecuting this suit to recover the title, basing his claim upon an equity which, if established, would entitle him to the relief he sought. In our opinion the law regarded him as prosecuting in good faith his equity and authorized him to make the redemption.

This view leaves nothing further to be decided in the case. We need not inquire whether the intervenor is the real owner of the certificate of redemption, a question raised by plaintiff which becomes immaterial in the foregoing view of the case.

It is our opinion that the judgment of the Circuit Court ought to be

AFFIRMED.

59	18
113	93
59	18
120	561
59	18
128	493
128	677

GRONAN V. KUKKUCK ET AL.

1. **Assault and Battery: PROVOCATION TO MITIGATE DAMAGES.** In an action for damages for assault and battery, it is the settled rule of this State that provocation given at the time of the assault, or within a prior time so recent as to justify the presumption that the offense was committed under the influence of passion excited thereby, may be shown in mitigation of damages; but if time for reflection intervened (one day in this case) after the provocation, it will not extenuate the violence.
2. ——: PLEADING: MENTAL PAIN. As mental pain is the natural and inevitable result of personal injuries, damages therefor need not be specially claimed in a petition in a cause for assault and battery.
3. **Practice: EXCLUDING ANSWER OF WITNESS: ERROR NOT PRESUMED.** The fact proposed to be established, or the evidence intended to be elicited by a question, must appear, in order to justify the conclusion that the ruling of the court in refusing permission of the witness to answer it was prejudicial error.
4. **Instructions: ALL THE LANGUAGE MUST BE CONSIDERED.** Objections to instructions which do not regard all the language used therein will not be considered.
5. **Assault and Battery: MITIGATION OF DAMAGES.** It is no ground for mitigation of damages for an assault and battery that the plaintiff denied making statements derogatory to the character of defendant, whereby defendant was greatly provoked.
6. ——: INSTRUCTION: MEASURE OF DAMAGES. In an action for an assault and battery, where the defendant asked an instruction to the effect that the plaintiff cannot recover for permanent injuries, unless they are proved by the preponderance of the evidence, it was not error for the court to add to such instruction a modification to the effect that if the jury found plaintiff entitled to recover for injuries from which he had not recovered, they should consider the length of time it will require him to recover as shown by the evidence.

Appeal from Jackson Circuit Court.

WEDNESDAY, JUNE 14.

ACTION to recover damages sustained by reason of an assault and battery committed by defendants upon the plaintiff. There were a verdict and judgment for plaintiff; defendants appeal.

Gronau v. Kukkuck.

A. R. Bartholomew and *A. R. Cotton*, for appellant.

W. C. Grohe and *L. N. Ellis*, for appellee.

BECK, J.—I. The petition charges that the assault and battery was committed by both of the defendants but the evidence shows that violence was used by Henry Kukkuck alone, and that the other defendant, his father, was present encouraging the son and instigating the assault. The answer of the son pleads, as justification, that plaintiff in the son's presence pronounced a statement, then made by the father, a lie. In separate answers the defendants denied all allegations of the petition. The alleged errors complained of by defendants will be considered in the order we find them discussed by counsel.

II. The court directed the jury that no words used by the plaintiff would justify the assault, but words of provocation used just before and at the time of the assault and battery: provocation should be considered in mitigation of exemplary damages. damages. and added to the instruction the following words: "But no words used by plaintiff to the defendants, or either of them, before the day of assault, or which came to their knowledge before that time, should be considered by you for any purpose."

Provocation given at the time of the assault or within a prior time so recent as to justify the presumption that the offense was committed under the influence of passion, excited thereby, may be shown in mitigation of damages. But if time for reflection intervened after the provocation, it will not extenuate the violence. This is the settled rule of this State. *Thrall v. Knap*, 17 Iowa, 468; *Ireland v. Elliott*, 5 Id., 478. A provocation arising on a day prior to the assault cannot be shown in mitigation of damages, for the law presumes sufficient time intervened before the assault to allow the passions to subside and reason to regain control of the mind.

The doctrine of the instruction sustains the ruling of the Circuit Court in excluding evidence of conversations and de-

Gronan v. Kukkuck.

clarations of the plaintiff, alleged to have occurred prior to the day of the assault, which were offered in extenuation thereof.

III. The court directed that mental pain suffered by the plaintiff should be considered by them as an element of damages. Counsel for defendant insist that as there is no allegation and claim in the petition, based upon mental pain suffered by plaintiff, he cannot recover therefor in this action. But as mental pain is the natural and inevitable result of personal injuries, damages therefor need not be specially claimed.

IV. The son, while testifying for defendants, was asked by their counsel this question: "State whether or not it was 3. PRACTICE: in any way understood between you and your father that plaintiff should be assaulted." An witness: error not presumed. objection by plaintiff was sustained. The record does not show what fact was proposed to be proved by the answer. The fact proposed to be established or the evidence intended to be elicited by the question must appear, in order to justify the conclusion that the ruling of the court in refusing permission to the witness to answer it was prejudicial error. See *Jenks v. Knotts Mexican Silver Mine Co.*, 58 Iowa, 549. Another objection, based upon the court's refusal to permit an answer to a question relating to the reputation of one of the defendants, is disposed of by the application of the foregoing rule.

V. An instruction to the effect that the father is liable if he acted in concert with the son, knowing his intention to assault the plaintiff, is objected to, on the ground that no such concert of action can be inferred from the evidence. We think differently, and that there was testimony to which the instruction was applicable.

VI. The same instruction is objected to on the ground that it holds the father liable if he had knowledge of the son's intentions. But the instruction is qualified by the condition that if the assault was made pursuant to the son's intentions in the presence of 4. INSTRUCTIONS: all language must be considered.

Gronan v. Kukkuck.

the father, without any objection on his part, and he aided and abetted or encouraged the son, he is liable. The instruction is correct.

VII. Counsel object to the sixth instruction, on the ground that it inferentially holds the father liable if he failed to make an attempt to prevent the son's assault, but the objection leaves out of view a part of the language to the effect that liability would be incurred by aiding and encouraging the son.

Other objections to instructions are based upon like constructions which do not regard all the language used therein. These objections need not be further noticed.

VIII. An instruction was asked, by the son, to the effect that the denial of plaintiff that he had made statements derogatory to the character of defendant, whereby <sup>s. ASSAULT
and battery:</sup> defendant was greatly provoked, should be considered in mitigation of damages. It seems to us that the fact assumed by the instruction instead of extenuating defendants' assault adds to the wrong. Surely the denial of the words ought to have had the effect of abating defendant's feeling instead of exciting him to violence.

IX. Counsel complain of the modification of an instruction asked by defendant to the effect that plaintiff cannot recover <sup>s. — : in-
measure of
damages.</sup> for permanent injuries unless they are proved by the preponderance of the evidence. The modification consisted in adding thereto a direction that if the jury found plaintiff entitled to recover for injuries from which he has not recovered, they should consider the length of time it will require him to recover as shown by the evidence. The modification announces a correct rule and it seems necessary in order to fairly present the law applicable to plaintiff's measure of damages. We discover no possible ground of prejudice to defendants by uniting it with the instruction asked by them.

The foregoing discussion disposes of all questions argued by counsel.

It is our opinion that the judgment of the Circuit Court ought to be

AFFIRMED.

Ballou v. Lucas, Adm'x.

59	22
79	343
59	22
86	191
69	22
120	673

BALLOU v. LUCAS, ADM'X, ET AL.

1. **Vendor and Vendee: FRAUD: VENDOR BY QUIT-CLAIM LIABLE FOR.**
A vendor who induces his vendee to purchase land by falsely and fraudulently representing that the title is perfect, is liable to the vendee for such fraud, even though the contract of purchase provided for, and the sale was consummated by, a quit-claim deed only.
2. **Practice in the Supreme Court: RELIEF LIMITED BY THE RECORD.**
While in this case it would *seem* that a judgment more favorable to plaintiff ought to have been rendered, yet, as he does not appeal, and makes no complaint, this court cannot inquire into the correctness of the amount of the judgment.

Appeal from Marshall District Court.

WEDNESDAY, JUNE 14.

ACTION in chancery to rescind a sale and conveyance of forty acres of land in Marshall county on account of fraudulent representations as to the title made by defendant to plaintiff. There was a decree granting the relief prayed for in the petition; defendant appeals. After the cause was brought to this court the death of Lucas was suggested and his administratrix was substituted as defendant.

J. M. Parker, for appellant.

L. L. Hamlin and Caswell & Meeker, for appellee.

BECK, J.—I. The petition alleges that defendant, for the purpose of defrauding plaintiff, represented to him that defendant was the absolute owner, under a good and perfect title, of the land involved in this suit; that plaintiff, relying upon defendant's representations, as to his title to the land, entered into a contract with defendant for its purchase, and in pursuance thereof and in payment for the land, conveyed to defendant a lot in the city of Marshalltown and paid him \$200.00 in money, and received from defendant a quit-claim deed for the land, and that defendant had no right, title or

Ballou v. Lucas, Adm'x.

interest in and to the land, which was well known to him. The plaintiff offers to reconvey the land to defendant by quit-claim deed, and prays that a decree be entered requiring defendant to reconvey the lot to plaintiff and that judgment be rendered in his favor against the defendant for \$200.00, being the amount paid in money upon the purchase of the land.

The answer of defendant denies the averments of the petition as to the alleged representations made by defendant regarding the title, and charges that plaintiff made examinations into the title and had full opportunity to protect himself against the alleged fraud of defendant, and relied upon his own judgment and knowledge in making the purchase. The defendant further alleges that prior to and at the time of the sale of the land he informed the defendant that his title to the land was based upon a sheriff's deed and that he would execute therefor a conveyance of no other character than a quit-claim deed.

II. The evidence we think supports the allegations of plaintiff's petition. It is satisfactorily shown that defendant represented to the agent through whom the sale was made that the title of the land was good, and also stated that he had or did have an abstract so showing. The representations in regard to the title were repeated to plaintiff by the agent, but it does not appear that the agent informed plaintiff that defendant claimed to have an abstract of title. The plaintiff made no examination of the title and we are well satisfied by the evidence that he relied upon defendant's representations that the title was good, and was influenced thereby to make the purchase.

The testimony clearly shows that defendant's title to the land was not good; that he claimed under a sheriff's deed executed upon a sale under a foreclosure of a mortgage. The title to a large interest in the land was in minor heirs who did not join in the execution of the mortgage, and their interest was in no manner and to no extent bound by it. Besides the land was covered by a prior mortgage, executed by the

Ballou v. Lucas, Adm'x.

mother of the heirs, who had executed the mortgage under which defendant claimed. This prior mortgage had been foreclosed and a part of the land sold thereon. It clearly appears that defendant's title, if valid to any extent, covered only a part of the land.

The evidence very clearly shows that defendant had full knowledge of the defects in the title under which he claimed, and was well advised that at most he could hold but a part of the land.

III. Counsel for defendant insist that as the contract of purchase provided for the execution of a *quit-claim* deed ^{1. vendor and vendee: fraud: vendor by quit-claim liable for.} which was accepted by plaintiff, he has no remedy against defendant for the fraudulent representations as to the title of the land. The position is based upon the familiar rule that one who takes lands under a *quit-claim* deed is not to be regarded as a *bona fide* purchaser without notice of outstanding titles and equities. But this doctrine is not applicable to this case. It prevails in settling conflicting titles and is intended to protect equities as against those charged with notice of their existence. It is never invoked to protect a fraudulent grantor who by false representations induces a confiding purchaser to believe that he acquires a good title under a *quit-claim* deed.

If in this case the deed executed by defendant had contained covenants of warranty, plaintiff could maintain the action. This is a familiar rule of the law and we do not understand counsel for defendant denies it. See 1 Hilliard on Vendors, p. 333; Cooley on Torts, p. 503. The reasons in support of a right of action to recover for fraudulent representations as to title, when a conveyance is made by *quit-claim* deed, appear to be stronger than exist in the case of a deed of warranty executed under like circumstances. In the last case the defrauded party has a remedy upon the covenants of the deed; in the first he is without a remedy unless an action for fraud may be maintained. It would be a reproach to the law to hold that a vendor who, by fraudulent representations, has

Ballou v. Lucas, Adm'r.

induced a vendee to accept a quit-claim deed for land can wholly escape liability for his fraud. The law ought to exact truth and honesty from vendors by quit-claim deeds as well as from those who give warranties of title. Of course if the grantor in a quit-claim deed makes no false representations he is not liable if the grantee acquires nothing by the deed. But in that case he is honest, at least does not deceive the vendee by misrepresentations. But when he induces the grantee by falsehood to accept a quit-claim deed there is no rule of law or equity which will relieve him of liability for his fraud.

IV. The plaintiff agreed with the agent representing him that he would pay in addition to the lot \$200.00 for the land <sup>2. PRACTICE
in the su-
preme court:
relief limited
by record.</sup> and that the agent should retain whatever of that sum should not be paid to defendant under the contract to be made with him. The defendant agreed to accept \$50, the agent thus making \$150.00 by the transaction. The decree of the District Court provides for the reconveyance of the land and the lot to the respective parties, and judgment is rendered against defendant for \$50, the amount he received from the agent. Plaintiff does not appeal, and makes no complaint of the decree but asks that it be affirmed. We therefore cannot inquire into the correctness of the amount of the judgment for \$50.

The decree of the District Court must be

AFFIRMED.

59 26
107 116

Town of Cantril v. Sainer.

TOWN OF CANTRIL V. SAINER.

1. **Town Ordinance: Intoxicating Liquors: Excess of Corporate Power.** Towns have power to prohibit the sale of such intoxicating liquors only as are not prohibited by statute, and an ordinance which prohibits the sale of *all* kinds of intoxicating liquors, including wine and beer and brandy peaches, is invalid, so far as the prohibition extends to liquors other than vinous and malt.
2. **—: Discrepancy Between Title and Subject.** Where an ordinance is entitled, "*Regulating the use and sale of intoxicating liquors*," but the substance of the ordinance, as found in the body of it, is entirely prohibitory, with no pretense of *regulation*, it is invalid for want of compliance with the law requiring the subject of an ordinance to be clearly expressed in its title.

Appeal from Van Buren District Court.

WEDNESDAY, JUNE 14.

THE plaintiff is an incorporated town under the general incorporation law of the State. The defendant is the agent and clerk of a joint stock company which was organized to maintain a "social club" where the members thereof could provide for their own use, wine and beer, and such articles of food as seemed to be desirable. The property belonged jointly to the members of the club, and any member had the right at any time to withdraw all or any part of his stock therefrom. The articles kept by the club were subject to delivery to the members thereof upon their order. The defendant was arrested, tried and convicted before the mayor of the town for a violation of an ordinance which prohibited such associations or clubs, and provided penalties for sales of intoxicating liquors by any officer or agent of such associations or by any other person. Upon a trial he was convicted. He appealed to the District Court where he was again convicted, and he now appeals to this court.

Lea & Wherry, for appellant.

Work & Brown, for appellee.

Town of Cantril v. Skinner.

ROTHBROOK, J.—That the authorities of the town were authorized to prohibit the sale of such intoxicating liquors as are not prohibited by the statutes of the State, cannot be disputed. And that sales through a "social club" are violations of the law, and may be prohibited by a proper ordinance, must be conceded. *State v. Meroer*, 32 Iowa 405. But when a conviction is sought under an ordinance of the town, it must be by such an enactment as reasonably and fairly accords with the law authorizing municipal corporations to enact and enforce ordinances. The ordinance in question in this case prohibits sales of all kinds of intoxicating liquors, including wine and beer and brandy peaches, by any association of persons, or by any person. So far as the prohibition extends to liquors other than vinous and malt, the ordinance is invalid, because the town has no power to pass and enforce it. *New Hampton v. Conroy*, 57 Iowa, 498. It is true, that, as the defendant in this case was prosecuted for selling beer, the ordinance, so far as it prohibited the sale of beer, may, under the authority of *Santo v. The State*, 2 Iowa 165, and other cases, be held to be valid as prohibiting the sale of liquors not prohibited by the law of the State. But this ordinance is in our opinion fatally defective in another respect. Section 489 of the Code requires that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title." The title is in these words—"Regulating the use and sale of intoxicating liquors." The subject as found in the body of the ordinance is entirely prohibitory. There is no pretense at regulation. Its whole scope is an absolute prohibition of the sale of any and all kinds of liquors, whether through the agency of clubs or associations of persons, or by any other person. The law requiring the subject of an ordinance to be "clearly expressed" in the title is more explicit than the constitutional requirement which provides that the title of every act of the legislature shall express the subject of the act. See Section 29, Article 3, of the Constitution.

Instead of the title of this ordinance being a clear state-

Tarkington v. Corley.

ment of its subject, it is wholly inconsistent with it, and states a wholly different subject—as different as regulation is from prohibition. We cannot disregard this provision of the law. It is not unreasonable that when a village assumes to itself the functions of a municipal corporation it should be held to a reasonable compliance with the laws of the State in the enactment of its ordinances, and to that end employ legal counsel if necessary.

REVERSED.

TARKINGTON v. CORLEY ET AL.

1. **Execution sale: CONTRACT: RIGHT TO REDEEM.** Where a purchaser at an execution sale, after the sale, offered to convey to the execution debtor the land purchased, upon being paid a certain amount within a certain time, which amount the debtor agreed to pay within the time named, if he could raise it, but failed to perform on his part; *held*, that these facts would not support an action by the debtor against the purchaser and his grantee to redeem the land.

Appeal from Shelby District Court.

WEDNESDAY, JUNE 14.

Action in equity to redeem. The plaintiff avers that in August, 1876 he was the owner of certain land in Shelby county; that the same being about to be sold upon execution he entered into an agreement with the defendant Corley for a loan of money; that the loan was to be made by bidding at the execution sale the sum necessary to purchase the land, and by paying to the sheriff the amount of the bid; that Corley in pursuance of the agreement bid off the land for \$310; that afterward Corley denied the plaintiff's right to redeem and sold the land to the defendant, Gammon, who bought with knowledge of the plaintiff's right to redeem; that Corley and Gammon have had use of the premises, and that the reasonable

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rental value during the time they have had such use is more than sufficient to pay the amount due from the plaintiff under his agreement. The defendants pleaded a general denial. There was a decree for the defendants. The plaintiff appeals.

Clinton, Hart & Brewer, for appellant.

A. R. Riley and Platt Wicks, for appellee.

ADAMS, J.—The defendants insist that the agreement if proven would be within the statute of frauds. In our opinion the agreement was not proven and we have no occasion to consider the legal question presented.

The evidence shows that plaintiff applied to Corley to bid off the land for him. It also shows that some negotiation took place between them in regard to the terms upon which Corley should do it. But Corley expressly denies that he agreed to bid off the land for the plaintiff, and says that he told plaintiff before the sale that he would not do it. We think that at the time the sale took place there was no agreement between them. There is no pretense that any time was agreed upon within which the plaintiff was to repay the amount of the loan. There was some talk about the rate of interest. The plaintiff testified that Corley said that "he should want a big percentage," and that he replied that he would give him ten, fifteen or twenty per cent if he could not do better than that. This was his testimony upon his examination in chief, and the fair inference from it is that the parties separated without any agreement as to the rate of interest, and had no further negotiation until after the sale. It is true that the plaintiff under the pressure of a cross-examination says that he agreed to pay twenty per cent; but this Corley denies, and we think the fact to be that the plaintiff testified upon his examination in chief to substantially all that was said.

We should think so even if there was no other evidence than that of plaintiff's testimony above set out, and Corley's denial

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of the truth of it. But it is undisputed that after the sale, and on the same day, the plaintiff went to Corley again, and asked him if he would give him a chance to redeem his land, and that the parties then entered into an agreement that the plaintiff should pay Corley the sum of five hundred dollars within thirty days if he could raise the money, and that Corley should accept it in payment. There is no evidence that at the time of this negotiation there was anything said about a previous agreement. It is inexplicable that, if there was a subsisting agreement at the time of the sale, the plaintiff should go to Corley afterwards on the same day, and solicit an agreement, and proceed straightway to enter into one which was far more burdensome; and that too, without any claim or pretense that they had had an agreement.

We ought perhaps to say that one Foss testified to hearing Corley, some time after the sale, speak of an agreement as made with the plaintiff at the time of the sale. But Foss' testimony must be taken in connection with the undisputed fact above set out. The reasonable inference is that the agreement referred to by Corley, if any, was the one made after the sale, but on the same day.

We have then a case where the purchaser at an execution sale offered to convey to the execution debtor the property purchased upon being paid a certain amount within a certain time, which amount the debtor agreed to pay within the time if he could raise it, and after having failed to perform on his part brings an action to redeem. We think that the action cannot be maintained.

We regret to reach this conclusion because it appears to us that the land was worth more than the amount for which it was sold. But no hardship, however great, would justify us in attempting to protect a party who has so clearly failed to take the proper steps to protect himself.

AFFIRMED.

Griffith, Adm'r, v. Parton.

GRIFFITH, ADM'R, V. PARTON.

1. **Verdict: CONTRARY TO INSTRUCTIONS: SET ASIDE.** The instructions of the court, without inquiry as to their correctness, constitute the law of the case, so far as the jury is concerned; and when the verdict is clearly inconsistent with the instructions, it should be set aside on motion.

Appeal from Shelby Circuit Court.

WEDNESDAY, JUNE 14.

ACTION AT LAW. There was a verdict and judgment thereon in the Circuit Court for plaintiff. Defendant appeals.

Sapp Lyman and J. W. De Silva, for appellant.

Smith & Cullison, for appellee.

BECK, J.—I. Plaintiff, as the administrator of Asher Barton, deceased, prosecutes this action. The petition is in two counts; the first alleges that the intestate sold to defendant certain real estate for which payment has not been made, and asks to recover the reasonable value thereof. The second count alleges the sale of the same property, and that, in consideration thereof, the defendant agreed to pay off all debts of the intestate, and after selling the property, to pay the proceeds thereof, together with all rent collected, less the sums expended in the payment of debts, to the heirs of intestate. It is alleged that defendant has received \$500 as rent and \$1,700 upon the sale of the property, and has failed and refused to pay any part thereof upon the debts or to the heirs. The answer is a general denial of the petition. A motion to set aside the verdict on the ground that it is in conflict with the evidence and the instructions of the court, was overruled.

II. The verdict of the jury was evidently upon the second count of the petition. There was evidence tending to support the contract therein pleaded. The defendant, in his evi-

Griffith, Adm'r, v. Parton.

dence, claimed that the consideration for the property was his agreement to pay the debts of the intestate which he has since discharged, and that he did not undertake to pay any sum or any of the proceeds of the property to the heirs of the intestate.

The court instructed the jury in effect, that if they found the property was conveyed to defendant under a contract binding him to pay the debts of the intestate, and to hold the balance of the proceeds of the property for the children of the deceased or any one of them, such balance would be in the hands of defendant a trust fund for the use of such children or child, and plaintiff could recover no part of it, unless it be shown that there were debts existing against the estate of the decedent; and as the evidence fails to show the existence of debts of the intestate, plaintiff cannot recover if the jury find the defendant agreed to hold the property or its proceeds for the benefit of the intestate's heirs or any one of them. This instruction is to be regarded as the law of the case without inquiry as to its correctness. But, as bearing upon the rule of the instruction, - see *Kelley, Adm'r, v. Mann, Ex'r*, 56 Iowa, 625.

There is no conflict in the evidence which can be interposed to support the verdict of the jury. The plaintiff's evidence all tends to prove that defendant did agree to hold the balance of the proceeds of the property, after payment of the debts, for the use of one of the children of the intestate. Defendant's testimony tends to establish that he was to pay the debts and was to pay nothing to the heirs. He testifies that he paid all the debts, and there is no evidence tending to show that any indebtedness of the intestate now exists. The jury could not have found for plaintiff upon defendant's evidence. Nor under the instructions could they have so found upon the testimony for plaintiff. While the evidence of the parties is in direct conflict upon the question of defendant's obligation to account to the heirs, yet the testimony of neither supports the verdict. If the jury found there was no con-

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tract to pay the heir, their verdict should have been for defendant; and, on the other hand, if they found defendant did agree to account to the heirs they were forbidden by the court's instruction to find for plaintiff. The verdict cannot, therefore, be supported, and the motion to set it aside ought to have been sustained.

REVERSED.

VAN HORN v. B., C. R. & N. R'y Co.

1. **Evidence: SOUND OF RUNNING TRAIN AS PROOF OF SPEED.** Where there was a question as to the speed at which the train was running by which the plaintiff's horses were killed, *held* that it was proper to allow witnesses to testify that they judged from the *sound* of the train that it was running very rapidly, and more than six miles per hour. The *weight* of such evidence it was for the jury, under the circumstances shown, to determine.
2. **CONTRIBUTORY NEGLIGENCE: HORSES ILLEGALLY RUNNING AT LARGE.** Where a person owning horses in a city allowed them to run at large at night, and to lie down and sleep on a railroad track, and the horses were injured by a passing train, his conduct was a circumstance tending to show him guilty of contributory negligence, unless he had a legal right to let them run at large; and when an ordinance of the city was offered in evidence to show that he had no such legal right, it was error to exclude it.

59	33
1126	233

59	33
141	627

Appeal from Benton District Court.

WEDNESDAY, JUNE 14.

ACTION to recover the value of certain horses alleged to have been killed by reason of the negligence of the defendant in running one of its trains. The accident occurred in the city of Vinton, between one and two o'clock at night. The plaintiff had turned the horses loose. They strayed upon the defendant's track and lay down at a point where the track crossed one of the streets of the city. The negligence complained of is, that the defendant was running its train at an

Van Horn v. The R. C. R. & N. Ry Co.

improper rate of speed. The defendant denied all negligence upon its part, and averred that the injury was caused through the negligence of the plaintiff. There was a trial to a jury and verdict and judgment rendered for the plaintiff. The defendant appeals.

J. & S. K. Tracy, for appellant.

Traer & Voris, for appellee.

ADAMS, J.—I. Two persons were allowed to testify against the objection of the defendant, that they judged from the sound of the train that at the time of the accident it was running very rapidly and more than six miles an hour, which it appears was the highest speed allowed by ordinance of the city. The defendant insists that the speed of a moving train cannot be determined by the sound with sufficient accuracy to justify the admission of evidence in regard to it, where the witness has no knowledge of it except as derived from the sound.

Small differences in the speed of moving trains cannot probably be determined by the sound, but we think that the difference between the speed of a slowly moving and of a rapidly moving train, could be distinguished quite easily from the sound by a person in the immediate vicinity. The evidence, we think, was not inadmissible. Such evidence, we think, could not, under all circumstances, be deemed wholly unreliable. What weight the evidence in question was entitled to, under the circumstances shown, it was for the jury to determine.

II. The defendant offered in evidence an ordinance of the city of Vinton prohibiting horses from running at large. The plaintiff objected to the ordinance and the objection was sustained.

The defendant's position is that where a person owning horses in a city allows them to run at large by night, and lie down and sleep on a railroad track, and the horses are injured

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by a passing train, his conduct would be a circumstance tending to show that he is guilty of contributory negligence, unless he has a legal right to let them run at large, and that the ordinance was admissible as showing that such right did not exist.

The rule contended for appears to have been held in *Hal-loran v. Railroad Co.*, 2 E. D. Smith 257, and *Bowman v. Railroad Co.*, 37 Barb., 37. And our attention has been called to no case which holds the contrary. It was held, it is true, in *Kuhn v. Railroad Co.*, 42 Iowa, 420, that the plaintiff was not precluded from recovering, because the cattle which were injured at a public crossing were being allowed to run at large. But the case turned upon the fact the plaintiff had the legal right to allow his stock to run at large. Where such right exists, the owner must be held to take the risk only of such injuries as do not result from the defendant's negligence. In the case at bar the ordinance offered would have shown that such right did not exist. We have a case then, where the plaintiff without excuse or justification allowed her horses to lie at night where they were obviously exposed to such accident as happened. We think that the ordinance should have been admitted.

It is not claimed, and could not, we think, be properly claimed, that the provision of section 1289 of the Code, respecting the restraint of domestic animals, has any application to this case. It would doubtless be applicable if the injury had occurred where the defendant had a right to fence, but it did not.

REVERSED.

MITCHELL v. LAUB.

1. Practice in Supreme Court: CERTIFICATE OF EVIDENCE WITHOUT DATE. To authorize a trial *de novo* in this court, the judge of the court below must have certified the evidence at the trial term, or during the following vacation, under Code, § 2742, or within the six months allowed for appeal, under chapter 35, section 1, Laws of 1882; and when the abstract shows the certificate of the judge, which is without date or other indication as to when it was executed, and the appellant does not aver that it was executed within the time prescribed by law, a trial *de novo* cannot be had in this court.

Appeal from Crawford District Court.

WEDNESDAY, JUNE 14.

ACTION in chancery to reform and enforce the specific performance of a contract executed by defendant for the purchase of an interest in a patent right for a brick machine, and an interest in the business of manufacturing and selling brick, prosecuted by the parties jointly. The answer, which is made a cross-bill, pleads that the contract was procured by fraud, and asks that it may be set aside and declared void. Plaintiff's petition was dismissed and the contract was canceled by the decree of the court. Plaintiff appeals.

E. K. Burch, and James & Aylesworth, for appellant.

Conner & Shaw and Clinton, Hart & Brewer, for appellee.

BECK, J.—The original abstract shows that the decree from which the appeal was taken was rendered April 16th, 1881, and that the clerk of the court on the 23d of August following certified to the evidence. An additional abstract afterwards filed shows a certificate to the evidence signed by the judge, but it is without date and it is in no manner shown when it was signed, nor is the date of its execution averred by

Hewit v. Jewell.

the appellant to have been within the time prescribed by law. To authorize a trial of this action *de novo* here, the judge of the court below must have certified the evidence under chapter 35, Acts Nineteenth General Assembly, section 1, within the six months allowed for appeal, or if this statute is not applicable to the case, at the term of the trial or during the vacation following, under Code, § 2742. *Cornell v. Cornell*, 54 Iowa, 366.

The certificate fails to show compliance with either of these requirements. It becomes unimportant to inquire which is applicable to this action. We cannot try the case anew. No errors are assigned, if the case should be found to be in a condition to be tried thereon. It cannot, therefore, be tried in this court. The judgment of the District Court must be.

AFFIRMED.

Hewit v. Jewell et al.

1. **Partition Fence: Definition of.** A partition fence, as contemplated in the statute, means a fence on the line between two proprietors, where there is no road, alley, or something else which would prevent the erection of such fence.
2. **—: LAND USED IN COMMON: WHEN NOT.** A person uses his land otherwise than in common when he segregates it from the adjoining land by the erection of a fence, or by such use of it that he and his neighbor cannot, in the nature of things, use their land in common.
3. **—: LAND NOT USED IN COMMON: OWNERS MUST ERECT FENCE.** Where neither the plaintiff nor defendant was using his land in common, in a county where stock was not restrained from running at large, either of them could be compelled to join in the erection of a partition fence on the line between their lands.

Appeal from Grundy Circuit Court.

WEDNESDAY, JUNE 14.

THE plaintiff filed a petition making the township trustees defendants and asking a *certiorari*, the object of which was

Hewit v. Jewell.

to set aside certain proceedings of said trustees, whereby he was required to erect a partition fence between land owned by him and other land owned by the defendants. The latter appeared and asked to be substituted as defendants, which was done and the cause was submitted on a stipulation as to the facts. The court affirmed the action of the trustees and plaintiff appeals.

H. C. Heminway, for appellant.

N. T. Johnson, for appellees.

SEEVERS, CH. J.—The plaintiff and defendants each own adjoining quarter sections of land for the cultivation of grain and grasses in the usual manner. The plaintiff's land is wholly unfenced, and the defendants, desiring to enclose their land, demanded of the plaintiff that he should join them in the erection and maintenance of a fence upon the line between their said lands. The plaintiff did not desire to have his lands enclosed and did not wish to use the same otherwise than above stated, and, therefore, refused to contribute towards the erection of said fence. The question is, whether he can be compelled to do so.

In *Syas v. Peck*, 58 Iowa, 256, it was held that in counties where stock is restrained from running at large an adjoining proprietor cannot be compelled to join in the erection of partition fences. The reasoning, however, in that case would indicate a different rule should prevail in counties where stock is not restrained. When one uses his land otherwise than in common he can be compelled to contribute to the erection of partition fences. Code, § 1495.

A partition fence, as contemplated in the statute, means a fence on the line between two proprietors where there is no road, alley, or something else which would prevent the erection of such fence. When, then, does a person use his land otherwise than in common? We think he does so when he segregates it from the adjoining land. His occupation being

Hewit v. Jewell.

such that he and his neighbor cannot, or do not, use their land together or in common. This may be done by the erection of a fence, but it may be done otherwise. One person may use his land for growing grain, and another for pasture. In such case the latter might not desire a fence, while the former undoubtedly would. One might desire to raise corn, another small grain. In such case the interest of one would be to pasture while grain was growing on the land of the other. The person whose crops needed protection where there is no partition fence would have to guard his crops to prevent their destruction. This would be a segregation of the land or a use not in common, in effect, the same as if fenced.

It should be remembered the rule in this State is, except it is otherwise provided by statute, that cattle and other stock are free commoners and he who desires to protect his crops from them must fence his premises or take other means equally effectual to preserve his crops. Neither the plaintiff or defendants were using their premises in common and therefore either of them could be compelled to join in the erection of a partition fence on the line between their lands. It does not appear from the agreed statement of facts whether the herd law is in force in Grundy county or not. But as the rule is error must affirmatively appear, no presumption can be indulged that such law is in force in said county.

AFFIRMED.

Kaiser v. Waggoner.

59 40
79 348

KAISER v. WAGGONER ET AL.

1. **Evidence: RES ADJUDICATA.** In an action to subject land to the satisfaction of a judgment, evidence as to matters which were adjudicated and concluded by the judgment is immaterial.
2. **Equity: QUITCLAIM DEED: SUBJECTION OF LAND TO JUDGMENT.** Where P. conveyed to W. the land in controversy, in consideration of the agreement of W. to pay P. & C., and, on these facts, plaintiff one of the creditors of P. & C., obtained judgment against W. for the amount of P. & C's indebtedness to him, held that plaintiff had the right in equity to subject the land to the satisfaction of the judgment, and, for that purpose, to follow it into the hands of W's wife, who held it by quitclaim deed from W., she not appearing to have paid value for the land.

Appeal from Black Hawk Circuit Court.

WEDNESDAY, JUNE 14.

ACTION IN EQUITY. Decree for plaintiff and defendants appeal.

Charles A. Bishop, for appellants.

E. M. Sharon, for appellee.

SEEVERS, CH. J.—In 1873 Jasper Parks transferred certain personal property and conveyed certain real estate to the defendant, Jacob Waggoner, and in consideration thereof the defendant agreed to pay the indebtedness of Parks & Cook. Based upon this agreement the plaintiff, claiming Parks & Cook were indebted to him, obtained a judgment against the said defendant.

A portion of the real estate so conveyed to the defendant he shortly after the rendition of said judgment conveyed to his wife Ann M. Waggoner. The consideration recited in the deed is one thousand dollars. The plaintiff claims said conveyance is fraudulent and void because made to hinder and delay creditors and especially the plaintiff. The object of this

Kaiser v. Waggoner.

action is to set aside the conveyance and subject the real estate to its payment.

I. The judgment is conclusive evidence that the defendant Jacob Waggoner, is indebted to the plaintiff and also that Parks & Cook were indebted to the latter. Therefore evidence tending to show Waggoner is not indebted to plaintiff, or that he had paid out on account of the indebtedness of Parks & Cook more money than he has or can realize from the property received by him from Parks, under the contract, is immaterial in this action.

II. As between plaintiff and Jacob Waggoner the former had the undoubted right in equity to subject the property in controversy to the payment of the indebtedness from Parks & Cook to him. He has that right now, unless Mrs. Waggoner is a bona fide purchaser for value without notice of such equity. There is no evidence excepting the recital in the deed tending to show that Mrs. Waggoner ever paid one cent for the property. By the quitclaim deed under which she holds she obtained the interest in, and right to, the land of her husband, and nothing more. She is not a bona fide purchaser and under the circumstances it was incumbent on her, in order to cut off the equity of the plaintiff, to establish she had paid value for the land without notice. *Watson v. Phelps*, 40 Iowa, 482; *Besore v. Dosh*, 43 Id., 211; *Springer v. Bartle*, 46 Id., 688.

It is not material therefore to inquire whether the conveyance to Mrs Waggoner was fraudulent or not, or whether Jacob Waggoner was insolvent or not, because the plaintiff had the right to subject this particular property as a primary fund to the payment of his debt.

AFFIRMED.

Towle & Roper v. Leacox.

• TOWLE & ROPER v. LEACOX ET AL.

59 42
119 126
59 42
d125 413

1. **Injunction Bond: ACTION ON: EVIDENCE.** In an action for damages on an injunction bond, it was error to render judgment for plaintiff in the absence of evidence that the injunction suit had been disposed of, and the judge's minutes upon his calendar that the suit had been dismissed are not the proper evidence of that fact. Such minutes do not constitute the judgment of the court.

Appeal from Fremont Circuit Court.

THURSDAY, JUNE 15.

THIS is an action to recover damages on an injunction bond. There was a trial to the court without a jury and judgment for the plaintiffs. Defendants appeal.

W. H. Wilson and T. R. Stockton, for appellants.

James McCabe, for appellee.

ROTHBROOK, J.—The injunction was granted to stay execution upon a judgment rendered by the Page county Circuit Court, and upon the ground that the judgment had been paid. It is averred in the petition that the injunction was dismissed. It appears that the judgment upon which the execution was issued was rendered in favor of one Haidenburg, and plaintiffs claim that the judgment was assigned in writing to them.

The appellants contend that there was no sufficient evidence introduced on the trial showing the assignment of the judgment, and no evidence that the injunction suit had been disposed of.

The appellees filed an additional abstract denying the correctness of appellants' abstract and averring that there was no valid bill of exceptions. The additional abstract is contradicted by appellants and we have thus been compelled to examine the transcript. It appears that a proper bill of exceptions was signed by the circuit judge on the same day that

Crouch v. Dere more.

the judgment was entered, and an examination of the transcript shows that all the evidence offered as to the dismissal of the injunction suit was an entry on the judge's calendar in these words: "Dismissed as per stipulation." The stipulation is not shown. It seems to us this was necessary and that it should also be shown that the judgment of dismissal was entered of record. The judge's minutes upon his calendar are not the judgment. See *Case v. Plato*, 54 Iowa, 64. It may be that the stipulation was such as to preclude any right of action upon the bond. At least it was for the plaintiffs to show that by the dismissal they had a right of action.

Whether there was sufficient evidence showing that the judgment had been assigned to plaintiffs, we do not determine, for the reason that the transcript is not at all clear on that question.

For the error in rendering judgment without evidence of the dismissal of the injunction suit, the judgment will be

REVERSED.

CROUCH V. DEREMORE.

59	43
92	174
59	43
95	513
59	43
114	93

1. **Special Verdict:** JUDGMENT ON: POWER OF COURT TO RENDER. A court cannot properly render judgment for plaintiff on a special verdict alone, unless, taken in connection with the pleadings, it is such as to show conclusively that the plaintiff was entitled to recover; and upon the application of this rule to the facts of this cause, *held* that the judgment upon the special verdict was improperly rendered.

Appeal from Allamakee Circuit Court.

THURSDAY, JUNE 15.

THE plaintiff William Crouch averred in his petition that in March, 1864, he was the owner of a county bounty warrant drawn in his favor for \$100 by Allamakee county, and left in the custody of the clerk of the District Court of the

Crouch v. Deremore.

county; that afterwards, and while the warrant was in the custody of the clerk, the defendant fraudulently obtained the warrant from the clerk and afterwards fraudulently presented the same to the treasurer of the county and drew the money due thereon.

The defendant pleaded a general denial. He admitted, however, that he drew from the treasury the money due on a certain warrant for \$100 made to William Crouch or bearer, which warrant he averred that he purchased of one Paddock. There was a trial to a jury, which was directed to make four special findings, and was not directed to render a general verdict. The jury made the special findings, which were to the effect that the warrant in question was drawn in favor of the plaintiff; that it was drawn payable to the plaintiff or bearer; that the plaintiff did not authorize any person to draw the warrant from the clerk or other county officer in charge of it; and that the defendant did not purchase it of Paddock. The jury rendered no general verdict. The plaintiff moved for judgment on the special verdict and the motion was sustained. The defendant appeals.

L. O. Hatch, H. H. Stillwell and Dayton & Dayton, for appellant.

J. W. Pennington, J. H. Boomer and S. S. Powers, for appellee.

ADAMS J.—The defendant assigns as error that the court erred in rendering judgment in favor of the plaintiff and against the defendant on the special verdict.

Whether it was competent for the court in the absence of any objection by any one to submit the case for a special verdict alone, we need not determine, as that question is not presented. It is certain that the court could not properly render judgment for the plaintiff upon the special verdict, unless taken in connection with the pleadings it is such as to show conclusively that the plaintiff was entitled to recover.

Crotch v. Dere more.

The warrant having been drawn in the plaintiff's favor it was the duty of the clerk to deliver it only to the plaintiff or to some person upon his order. We must presume that it was so delivered unless the special verdict taken in connection with the pleadings shows that it was not. There is no direct averment in the petition that the warrant was not delivered to the plaintiff, nor to any person upon his order. The plaintiff predicated his right of recovery wholly upon the ground that the defendant obtained the warrant from the clerk by fraud. Now, unless the special verdict in connection with the pleadings shows such to be the fact, the plaintiff was not entitled to judgment. The jury did not find that the defendant obtained the warrant by fraud. There is nothing in it to overcome the presumption that the clerk delivered it to the plaintiff or to some person upon his order as it was his duty to do. But it is insisted that under the verdict *and pleadings* the law raised a conclusive presumption that the defendant obtained it by fraud, and that the court was justified in rendering judgment upon such presumption. The plaintiff's theory is that as the defendant averred that he obtained the warrant from Paddock, and that as the jury found that he did not, it is therefore to be conclusively presumed that he obtained it from the clerk by fraud. The warrant which the defendant avers that he obtained from Paddock is denominated in the answer as "a certain warrant." But conceding that the defendant intended by "a certain warrant" the warrant in question, we do not think that it necessarily followed from the mere fact that he did not obtain the warrant from Paddock that he obtained it from the clerk by fraud.

It was not necessary for the defendant to aver from whom he obtained the warrant. But having averred it, was it necessary for him to prove it? It was sufficient for him to rest upon his general denial. *Crosby v. Hungerford*, decided at the present term. No evidence was called for upon the defendants' part until the plaintiff had introduced evidence tending to show that the warrant was not delivered to him nor to

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any person upon the plaintiff's order, and that it did come into the hands of the defendant. But the defendant's unnecessary averment and failure to prove it did not entitle the plaintiff to judgment.

REVERSED.

HOWLAND v. KNOX.

50	46
84	254
50	46
86	667
59	46
89	157
50	46
111	539
59	46
117	502
50	46
143	43
143	46

1. **Fraudulent Conveyance: EQUITY OF GRANTOR: SUBSEQUENT JUDGEMENTS NO LIEN: REDEMPTION.** Where a party conveys his real estate with the intent to defraud his creditors, the conveyance is absolute as to him, and he attains no equitable interest therein which is the subject of a lien, under our statute, in favor of a subsequent judgment creditor of the grantor; and hence, such judgment creditor has no statutory right to redeem the property from a sale thereof, made under special execution, at the suit of other creditors, who have had the conveyance set aside in a proceeding in equity.
2. ——: RIGHTS OF CREDITORS. When a debtor fraudulently conveys his property to defeat his creditors, the creditors may, after judgment, adopt one of two courses: they may, by an action in chancery, subject the property to the payment of their judgments; or they may levy upon the property and sell, and afterwards go into chancery and quiet their title

Appeal from Benton District Court.

THURSDAY, JUNE 15.

THIS is an action in equity, by which it is sought to redeem certain real estate from a sale on execution. There was a trial to the court and a decree was entered dismissing the plaintiff's petition, from which he appeals.

J. C. Traer and O. L. Cooper, for appellant.

Gilchrist & Haynes, for appellee.

ROTHROCK, J.—The material facts in the case are not in dispute and are as follows:

About the 1st of October, 1874, John F. Pyne, being the

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owner of the real estate in controversy, conveyed it to M. P. Woods, in trust for his (Pyne's) minor heirs. During the months of October and December, 1874, the creditors of Pyne obtained judgments against him in the District and Circuit Courts of said county. Plaintiff herein being one of the creditors recovered his judgment on the 24th day of December, 1874. In the year 1876 all the judgment creditors of Pyne, excepting the plaintiff herein, united as plaintiffs in an action in equity by which they sought to subject the real estate in controversy to the payment of their judgments, upon the ground that said conveyance was fraudulent as to them. There was a trial of the action and it was found that the conveyance was invalid and a decree was entered subjecting the property to the payment of the judgments of the plaintiffs in the action, and fixing their rights of priority in the application of the proceeds of a sale on special execution. The defendants appealed from the decree in that case and the same was affirmed by this court. See 55 Iowa, 348. No supersedeas bond was filed, and special execution issued on the decree, and on the 17th of July, 1880, the property in controversy was sold by the sheriff to John Thomas, one of the plaintiffs in that action, for \$400. The sale was made without redemption, and the sheriff immediately executed a deed to said Thomas for said property. On the 17th of January, 1881, the defendant Knox purchased the property and received a warranty deed therefor. On the 16th of April, 1881, and within nine months after the sheriff's sale on special execution, the plaintiff herein deposited with the clerk of the court the full amount of money necessary to redeem from the sale, claiming that he had the right of redemption. The defendant refused to accept the money so deposited, and this action was brought to compel a redemption and a conveyance of the property to the plaintiff.

There are other facts and issues in the case which we do not think it is necessary to state, because in our opinion the rights of the parties are fixed by the facts above recited.

Howland v. Knox.

The plaintiff claims the right to make statutory redemption of the property from the sale, because he is a judgment creditor of Pyne. To entitle him to that right he must show that his claim was a lien upon the real estate when the offer of redemption was made. Code, § 3103. He claims, that, as under our statute, Code, sections 45 and 2882, judgments are liens upon real estate owned by the defendant, and upon any legal or equitable interest therein owned or held by the defendant, his judgment was a lien upon the property in controversy, because the conveyance thereof was fraudulent as to him. That a judgment is a lien upon an equitable interest in real estate has frequently been determined by this court. *Harrison v. Kramer*, 3 Iowa, 543; *Cook and Sargent v. Dillon*, 9 Id., 407; *Lippincott, Johnson & Co. v. Wilson*, 40 Id., 425; *Twogood v. Stephens*, 19 Id., 405.

The real question then in this case is, did Pyne, the judgment debtor, have any equitable interest in the property in controversy after he made the fraudulent conveyance to Woods? He had no interest that he could enforce as against Woods, because the law will not allow him to take advantage of his own wrong. As to all the world, excepting his creditors, the conveyance to Woods was valid and unimpeachable. As to his creditors it was voidable only, and they could subject the property to the payment of their debts only by uncovering the fraud by an action in chancery. A levy of an execution upon this land and a sale without other proceedings would be wholly unavailing. When a debtor fraudulently conveys property to defeat his creditors, the creditors may, after judgment, adopt one of two courses. They may, by an action in chancery, subject the property to the payment of their judgments, or they may levy upon the property and sell, and afterwards go into chancery and quiet their title. *Harrison v. Kramer, supra*. But a sale on execution, without such subsequent action, would confer a mere barren right without value, because the legal title of the fraudulent grantee without

Howland v. Knox.

an adjudication against him would be an insuperable barrier to the acquisition of right, title, or possession. *Lippincott, Johnson & Co. v. Wilson*, 40 Iowa, 425.

In our opinion the defendant in a judgment has no such interest, equitable or otherwise, in real estate which he has conveyed to defraud his creditors, as is the subject of a lien in favor of the judgment creditor.. There is no case in this State which so holds. In *Stadler Bro. & Co. v. Allen*, 44 Iowa, 198, it is held that a judgment which cannot be enforced against property, is not a lien thereon. It is true that in some of the cases cited by counsel for the appellant, which hold that judgments are liens upon equitable interests, it was sought to subject lands fraudulently conveyed to the payment of judgments, yet the question of the judgments being liens in the sense that the judgment creditor was entitled to make statutory redemption was in no manner involved. On the other hand as implying, at least, that a judgment is not a lien under the statute in such cases, see *Bridgman & Co. v. McKissick*, 15 Iowa, 260, where it was held that a junior judgment creditor by first instituting equitable proceedings to subject property to the payment of his debts, acquires a priority of lien over a senior judgment creditor who has been less diligent.

This decision can only be sustained upon the theory that the lien does not attach by virtue of the statute, but by the assertion of the right in the creditor to subject the property to the payment of the judgment. If the judgment is a lien in such case, how could it be displaced or deferred by a junior lien of the same kind?

If the judgment of the plaintiff was not a lien under the statute, that appears to us to be an end to this case. It is hardly necessary to say that the decree in favor of the other creditors, which operated to subject the property to the payment of their judgments, in no manner enlarged or changed the rights of the plaintiff. He was not a party to that action and nothing in that decree operated to make his judgment a lien upon the property.

District Township of Washington v. Thomas.

It is true that in the case of *Chataqua Co. Bank v. Risley*, 19 N. Y., 369, it is held that a judgment creditor is in such case entitled to assert the statutory lien and is not required to take any equitable remedy. But as opposed to this see *Rappolige v. International Bank*, 93 Ills., 396; and Freeman on Judgments, Ed. of 1881, Sec. 350.

AFFIRMED.

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DISTRICT TOWNSHIP OF WASHINGTON v. THOMAS.

- 1 District Township: POWER OF ELECTORS TO DISCHARGE DEBTOR.
The electors of a district township can exercise such powers only as are conferred by statute, either expressly or by reasonable implication; and section 1717 of the Code, conferring upon the electors the power "to direct the sale or other disposition to be made of any school-house or site thereof, and of such other property, personal or real, as may belong to the district," does not authorize the electors to discharge a debtor of the district without consideration.

Appeal from Linn Circuit Court.

THURSDAY, JUNE 15.

ACTION upon a promissory note executed to the plaintiff by the defendant and one Mounce. The defendant for answer averred that he signed the note as surety; that the principal absconded; that the electors of the district township voted to release the defendant and afterwards the directors of the district township voted to release him, whereby he became released and discharged. The plaintiff demurred to the answer and the demurrer was sustained. The defendant elected to stand upon his answer, and judgment was rendered for the plaintiff. The defendant appeals.

Alexander Campbell, for appellant.

J. C. Davis, for appellee.

District Township of Washington v. Thomas.

ADAMS, J.—It was held in *District Township of Taylor v. Morton*, 37 Iowa, 550, that a board of directors of a district township cannot, without consideration, discharge a debtor, unless authorized by the electors. It was not held, however, that the electors could authorize such discharge. In the case at bar they attempted to authorize the discharge, and did authorize it if they had the power; and the question presented is as to whether they had the power.

The electors of a district township can exercise such powers only as are conferred by statute, either expressly or by reasonable implication. The statute relied upon in this case is section 1717 of the Code, which provides that the electors shall have the power "to direct the sale or other disposition to be made of any school-house or the site thereof, and of such other property, personal or real, as may belong to the district." It is insisted that the power to authorize the discharge of the defendant is included in the power to direct the disposition of the property of the district township. But, in our opinion, the discharge of a debtor without consideration, is not the disposition of property within the meaning of the statute. The demurrer, we think, was properly sustained and the judgment must be

AFFIRMED.

Brown v. Byam.

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BROWN V. BYAM ET AL.

1. **New Trial: PETITION FOR: ORDER OF PROCEDURE UNDER.** Upon the hearing of a petition for a new trial, under the first subdivision of sections 3154 and 3155 of the Code, the court should first make an order of record granting (in a proper case), a new trial, before proceeding to determine the merits of the original case upon the issues made therein.
2. **Judgment Procured by Fraud: PETITION TO VACATE: MEASURE OF RELIEF UPON.** Where plaintiff petitioned the court to "set aside, vacate and reverse" a judgment rendered against him, on the ground of fraud practiced by the defendants in procuring it, and the issues were made up as prescribed under section 3158 of the Code, nothing could be tried but the question whether the judgment should be set aside and vacated; and if it was error for the court, upon the trial on such petition, to render judgment against the defendants on the issues in the original cause.
3. **Judgment: PREJUDICIAL FRAUD IN SECURING: FACTS CONSTITUTING.** The facts constituting the fraud practiced by defendants in procuring the judgment in this case considered, and held so prejudicial to plaintiff as to justify the vacation of the judgment against him.
4. **Practice in the Supreme Court: COSTS OF AMENDED ABSTRACT.** Where the cause was reversed in the Supreme Court, and the abstract of appellant does not seem to have been prepared in bad faith, in order to throw the burden of preparing an additional abstract on the appellee, but, on the contrary, the appellant's abstract fairly presented the questions to be determined, a motion to tax the cost of printing appellee's additional abstract to the appellant must be overruled.

Appeal from Delaware Circuit Court.

THURSDAY, JUNE 15.

The facts are stated in the opinion.

*John S. Peters and A. S. Blair, for appellant.**Welch & Welch, for appellee.*

SEEVERS, CH. J.—The petition states in 1872 the plaintiff commenced an action in equity against the defendants and that issues were formed therein, the substance of which are set forth in the petition. That upon the trial of said action judgment was rendered for the defendants; that upon the

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trial it became, and was, a material question whether a certain deed to one Wilkinson, and another deed from him to E. C. Lewis were genuine instruments or were false and fraudulent, made for the purpose of cheating the plaintiff at the instance of defendants; that on said trial there was produced and read, what purported to be the deposition of said E. C. Lewis, but in truth, and in fact, said deposition was sworn to by one Samuel Henton, whom the defendants procured to personate said Lewis, and that said deposition was false; that said judgment was obtained "by and through false and fraudulent evidence and particularly by the false evidence of the said Henton, under the false name of Lewis aforesaid." The relief asked is "that said judgment in said suit rendered against this plaintiff and in favor of the defendants be vacated, that said cause be opened for a new trial, and said judgment reversed." The defendants filed an answer and in substance denied the allegations upon which the relief asked is based.

The trial was to the court and it was ordered and adjudged "that the judgment and decree rendered against the plaintiff and in favor of the defendants in the original suit of Jacob Brown against Philander Byam and Ester I. Byam be and the same is set aside, vacated and reversed, as prayed by the plaintiff," and the court proceeded to render a judgment against the defendants and granted the other relief asked in the original action.

The defendants excepted, and appeal. Errors have been assigned which are sufficiently specific to present the questions discussed by counsel for appellant, by whom it is insisted: That the court erred in rendering judgment against the defendants as asked in the original petition; that no such relief was asked, and all the court could do under the petition in this proceeding was to set aside and vacate the judgment and make such order in relation to the retrial as was just and equitable.

Brown v. Byam.

It is provided by statute that the District or Circuit Court shall have power after the term at which a judgment is rendered to "vacate or modify such judgment."

First. "By granting a new trial for the cause within the time and in the manner prescribed by the sections on new trials.

* * * *

Fourth. "For fraud practiced by the successful party in obtaining the judgment or order." * * *

Section 3155 of the Code, provides when the grounds of the new trial are not discovered until after the term the application must be made by petition, and the facts stated therein shall be deemed denied and the case shall be tried as on ordinary proceeding. In section 2837 a new trial is defined and the grounds upon which it may be granted stated, among which is that of newly discovered evidence. Counsel for the appellee insists this proceeding was commenced under the first subdivision of section 3154 and section 3155, for a new trial as therein provided, and when the petition is filed and no objection is made thereto, the new trial is granted, and the court should proceed to determine the merits of the case as presented in the original petition under the issues formed. Conceding the premises to be correct the conclusion, we think, cannot be sustained.

The filing of a petition for a new trial cannot have any greater force and effect than would a motion seeking the same thing, when filed within the time prescribed by statute. Before there can be a new trial the court must make an order granting it, which should be entered of record among the proceedings of the court. The petition for a new trial is deemed denied by operation of law. It is therefore unnecessary for the party to object thereto in an answer to the petition, and clearly he is not compelled to demur.

1. NEW TRIAL: petition for: order of procedure under.

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But we do not think this is an application for a new trial as claimed by appellee. It is an application to the court to "set aside, vacate and reverse" a judgment on the ground of fraud practiced by the successful party.

2. JUDGMENT
procured by
fraud : peti-
tion to vacate:
measure of re-
lief upon.

The petition does not ask a new trial, but it does ask that the judgment be vacated and set aside.

This being the only relief asked, there was no other issue. The issues were made up as prescribed in section 3158 of the Code, which provides the "cause of the petition above shall be tried." That is, nothing can be tried but the question whether the judgment shall be set aside and vacated. This, however, cannot be done until it has been adjudged there is a valid defense or cause of action. Code, § 3159. The court shall first determine whether the judgment shall be vacated before determining there is a valid cause of action or defense. Code, § 3160. This statutory issue is embraced in every case, no matter what other issues may be made by the parties. It therefore need not be pleaded because it exists by operation of law. The statute does not contemplate when the court determines there is a valid cause of action, it should proceed to render judgment. The statute does not so provide. We understand it is not the duty of the court in such case to carefully weigh the evidence and determine upon which side there is a preponderance, but to examine the evidence produced, and therefrom in connection with the evidence introduced on the former trial, determine whether there is reasonable ground to believe a different result will be reached upon a retrial. In other words, in the present case has the plaintiff been prejudiced by the fraud of the defendants? Not that this must certainly appear, but is there reasonable ground to so believe? If there are doubts as to this, we incline to think they should be resolved in favor of the plaintiff. The fraud having been clearly shown, a presumption of prejudice should follow, unless the court is able to say from the record the prejudice was not material. In actions at law the parties would have the right to trial by jury in the main action, but not in pro-

Brown v. Byam.

ceedings of this character. *Carpenter v. Brown*, 50 Iowa, 451. This affords an additional reason why the court should not in such cases determine disputed questions of fact which would be a finality to the controversy, unless the case was such the court would be warranted in granting a new trial if the jury found contrary to the view of the court. In such a case the court should and no doubt would say a new trial should not be granted, because the same result would be reached on another trial. This same rule, we think, should prevail in equity. The statute, however, contemplates proceedings of this character should be tried as actions at law. In view of this statute, we do no think it can be said this was treated and tried as an equitable proceeding. The evidence was taken down in writing, but this could have been done in any event. We are unwilling to say either party should be in any respect prejudiced because of the mere form in which the evidence was taken. The court in rendering judgment against the defendants erred.

II. The next question is whether the fraud of the defendants was in fact prejudicial. That the court thought it was, ^{s. JUDGMENT:} is undoubtedly true. The proceeding being at law ^{fraud in pro-} and so tried, the usual presumptions should prevail ^{curing facts} constituting in favor of the judgment of the court. But conceding the case was treated and tried as an equity cause and should be tried *de novo* here, the finding of the court in this respect is correct. Without taking up the time or space that would be required to state at length the scope and effect of the evidence upon which reliance is placed, we deem it sufficient to state our conclusions. *First.* The fraud of Philander Byam is clearly shown; *Second.* All the material facts in the depositions purporting to be that of Lewis are false; *Third.* There was some evidence on the former trial tending to show complicity between Byam and Wilkinson, or that the former procured some one to personate the latter. Now the fact that Byam did perpetrate the fraud of procuring Henton to personate Lewis and swear falsely, should

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have some effect in the consideration of the evidence and the weight to be given thereto. It being sufficient for us to be able to say there is reasonable grounds to believe the plaintiff has a valid cause of action and that a different result may be reasonably anticipated on the retrial.

A motion is made by the appellee to tax the costs of printing his additional or amended abstract to the appellants, upon the ground the abstract prepared by appellants was so unfairly and imperfectly prepared as to render the one printed by appellee absolutely essential to the proper presentation of the case. We are satisfied the abstract was not prepared in bad faith or that it was purposely done to throw the burden of preparing an additional abstract on the plaintiff. On the contrary, we think the abstract of the appellant fairly presented the questions to be determined. The motion must be overruled. So much only of the judgment of the court following the setting aside of the former judgment will be

REVERSED.

MARKLEY, RECEIVER, v. RHODES.

1. **Note Payable in Bank Stock: ACTION ON: DEMAND NECESSARY.**
On a note payable in bank stock, an action for a money judgment cannot be maintained, until it is shown that the note was reduced to a money claim by demand pursuant to its terms, and that the defendant has neglected or refused to deliver.
2. **Agency: PRESIDENT OF BANK AGENT OF BANK.** If the contract was with the bank, and was made with the president of the bank, and the stock provided in the contract to be delivered was transferred to the president, he would, under the law, hold the stock for the bank, and it would be regarded as the bank's property.

Appeal from Black Hawk District Court.

THURSDAY, JUNE 15.

ACTION AT LAW. There was a verdict and judgment rendered thereon for defendant. Plaintiff appeals. The pleadings are set out and the facts are stated in the opinion.

Markley, Receiver, v. Rhodes.

Hemenway & Polk, for appellant.

J. J. Tolerton and Boies & Couch, for appellee.

BECK, J.—I. The original petition presents the cause of action in the following allegations:

“That September 1, 1871, under the laws of Iowa, a corporation was organized under name of the Bank of Cedar Falls, for the transaction of a general banking business, the principal officers and those actively engaged in the transaction of its business being the president and cashier, the other officers being a vice-president and board of directors.

“That from the date of organization to December 10, 1874, one A. C. Thompson, was president, J. L. Stuart, cashier, and the defendant vice-president, and all members of the board of directors; that by virtue of their duties, said Thompson and Stuart, were the custodians of the property of the corporation and in particular of the bills receivable.

“That July 27, 1874, defendant being indebted to said bank \$2,000, duly made and delivered to the bank his promissory note therefor, to bear interest at 10 per cent per annum and due August 1, 1874.

“That on the 10th of December, 1875, the note being unpaid and defendant being the owner and holder of certain stock of the bank, he in fraud of the rights of the corporation and the stockholders thereof, entered into an agreement for the sale of said stock to said Thompson and Stuart, and in consideration therefor said note was delivered up to him, in consideration of which delivery he transferred said stock to said Thompson and Stuart; that the note has never been paid to said bank; that defendant at the time had full knowledge that the bank received no consideration therefor; and that the note was in no manner paid by him.

“That by order of the District Court of Black Hawk county, Iowa, the plaintiff is the receiver of the assets of said bank, with authority to collect all indebtedness.”

The answer avers that defendant sold to Thompson and

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Stuart, the president and cashier of the bank, on their own account, twenty shares of its stock; that they made certain payments upon the purchase, but were not prepared to pay a balance of \$2,000, whereupon it was so arranged that Thompson deposited in the bank, to defendant's credit, \$2,000, and defendant executed an instrument in the following words:

“\$2,000. CEDAR FALLS, Iowa, July 27, 1874.

“On or before the first day of August, 1874, for value received, I promise to pay Bank of Cedar Falls, or order, Two Thousand Dollars, with interest at the rate of ten per cent per annum till paid, payable at the Bank of Cedar Falls.

“This note is to be paid by the transfer of its equivalent with stock of the Bank of Cedar Falls when called upon for that purpose, now owned by undersigned.

J. E. RHODES.”

This instrument was intended to witness the contract of the parties and bind defendant to transfer the stock which he had sold to Thompson and Stuart, and it is averred that it is the same instrument referred to in the petition as a promissory note. It is further averred that defendant did assign his stock pursuant to the terms of this instrument which was surrendered to him, and he also withdrew the \$2,000 deposited to his credit.

The answer further shows, that, after the assignment of the stock, Thompson made his promissory note for a large sum which he owed the bank, a part thereof being for the \$2,000 paid defendant, and transferred to the bank the stock received of defendant as collateral security, which is now held by the receiver, and that payment to the amount of \$5,000 has been made upon the note.

The petition was filed November 2, 1876. And pending the trial, which was had in November, 1878, the following amendments to the petition were filed.

“2. That on or about July 27, 1874, the defendant, while vice-president and director of the bank, wrongfully, fraudulently, and in violation of his duties as such officer, and acting

Markley, Receiver, v. Rhodes.

in concert with Thompson, president thereof, executed a contract in writing, named in defendant's answer, and caused the same by the aid of Thompson to be so placed upon the books of the bank that defendant wrongfully and without any consideration given received credit on the books of the bank for the sum of \$2,000, which defendant afterward checked out of said bank.

"3. That on or about August 21, 1874, the bank paid to and for the use of defendant \$2,000, upon his written order or check of which plaintiff has not possession, which sum defendant has never repaid; that defendant had no funds with which to pay said check; nor did he afterward place funds there for such purpose; and that the check was paid with the money of the bank."

The defendant pleaded a general denial and set up the statute of limitations to the second amendment, being the third count of the petition.

II. The court gave an instruction to the jury in the following language:

"9. One of the questions for you to determine is, whether this was a transaction with the bank. If you should find that this contract and agreement was made with the bank, no action can be maintained on the contract until a demand for the delivery of the stock is shown, and a neglect or refusal, the instrument not being a negotiable instrument, being a note payable in property and not in money."

This instruction, we think, is correct. If, as plaintiff claims, the note and contract were transactions with the bank, the plaintiff, to recover thereon in this action, must show that the note was reduced to a money claim by demand pursuant to its terms. There is no pretense that this was done. The instruction therefore ends plaintiff's case upon the first count of his petition. Whatever errors may have been committed by the court in the admission of evidence, and plaintiff claims that errors were thus committed, he is not entitled to recover in the absence of proof of a demand. If the evidence complained

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of by plaintiff had been rejected and the jury had found for plaintiff, in the absence of proof of demand, the verdict would have been set aside, or had the District Court refused to set it aside, we would have reversed the judgment.

III. But it is said that the evidence shows that defendant transferred his stock to Thompson, and as it was out of his power afterwards to transfer to the bank, a demand would have been vain and therefore was not required by the law. It is a sufficient answer to this to say that if the transaction was with the bank, Thompson, being president of the bank and the officer making the contract, in that case would under the law hold the stock for the bank, and it would be regarded as the bank's property.

IV. The second count of the petition, being the first amendment, charges defendant with fraud in executing the contract and causing it to be entered upon the books of the bank, so that he received \$2,000 without consideration given therefor.

There is no evidence to support the charge of fraud, or to establish that defendant received from the bank money without consideration. He, without controversy, did transfer the stock to Thompson; this was the consideration of his credit upon the books of the bank.

V. The third count of the petition, the second amendment, is disposed of by the like considerations. There is no evidence to support its averments. Defendant did have funds in the bank out of which his check was paid.

We need not consider the question arising upon the defense of the statute of limitations.

VI. A verdict, had it been found under either the second or third count, would have been set aside by the court below, as being without the support of testimony, and had it not been set aside, we would have reversed judgment.

Other points and questions discussed by counsel need not be considered, as the views we have expressed dispose of the case. The judgment of the District Court must be

AFFIRMED.

Cressy v. Town of Postville.

CRESSY v. TOWN OF POSTVILLE.

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1. **Cities and Towns: DEFECTIVE SIDEWALKS: INSTRUCTION.** Where plaintiff sought to recover damages for injuries sustained by her from stepping into a *hole* in a broken sidewalk, at a place which was free from snow and ice, and the evidence showed that the injury resulted wholly from a fall caused by plaintiff's stepping into a hole, it was error to instruct the jury that the defendant was liable for injuries resulting from plaintiff's stepping on the *ice* on the sidewalk. Such instruction was clearly misleading and prejudicial, as directing the jury to consider matters not found in the petition or evidence.
 2. —— : —— : **CONTRIBUTORY NEGLIGENCE.** Ordinary care is to be used at all times and in all places in using sidewalks, and if, by the exercise of such care, the hole in question could have been discovered by plaintiff, she cannot recover for injuries resulting to her from stepping into it.

Appeal from Alamakee District Court.

THURSDAY, JUNE 15.

ACTION to recover for personal injuries sustained from a fall upon a sidewalk along a street of the town. The petition is in the following language:

"The defendant is an incorporated town in Allamakee county, Iowa. That long prior to the 23d day of February, 1879, there was constructed along the south side of Tilden street, within said town, a sidewalk, the same being placed one foot from the fence, on the south line of said street, leaving a space of one foot between the fence and the sidewalk and about eight inches to fourteen inches deep, and defendant had negligently suffered said sidewalk to become broken and to remain broken, and that for a long time prior to February 23d, 1879, there was a hole ten inches wide and twelve inches long, and from eight to fourteen inches deep, broken through said sidewalk, and that for more than three months prior to February 23d, 1879, defendant and its officers had due notice of the existence, character and dangerous location of said hole through said sidewalk, and neglected to repair

Cressey v. Town of Postville.

the same; that defendant suffered ice and snow to accumulate along the center of said sidewalk, rendering the center of said sidewalk, on the 23d day of February, 1879, almost impassable; that on the night of February 23d, 1879, in walking along said side walk, in consequence of the negligence of the defendant in leaving said space, between the said sidewalk and fence, and suffering the same to remain broken, and snow and ice to accumulate, the plaintiff, without any negligence or want of care on her part, stepped through said hole in the sidewalk, was thrown down into the space between the walk and fence, and was seriously and permanently injured, suffering great pain, physical and mental, and rendered unable to perform labor of any kind; and claiming damage in the sum of five thousand dollars."

The answer denies the allegations of the petition and avers that the accident was caused by plaintiff's negligence.

There was a verdict and a judgment rendered thereon for plaintiff. Defendant appeals.

S. S. Powers and L. E. Fellows, for appellant.

Robert Quigly and L. O. Hatch, for appellee.

BECK, J.—I. The District Court at the trial of the case gave the jury an instruction in the following language:

"5. If the defendant suffered snow to accumulate on its sidewalk and to become packed in ridges and so to remain an unreasonable time and become ice, and the sidewalk thereby became dangerous to pedestrians, and if this condition of the sidewalk was actually known to the town authorities, or if it had existed so long that it should have been known, and may reasonably be presumed to have been known to the authorities; or if such condition had become publicly notorious, and had existed after such actual or presumptive knowledge or public notoriety long enough to give time to remove the snow and ice, then the defendant did not use ordinary care, but was guilty of negligence in respect to the sidewalk.

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"And if, under either of such circumstances of negligence on the part of the defendant, the plaintiff, in the exercise of ordinary care, *stepped on the ice* on the sidewalk and was *injured thereby*, the defendant is liable to her in damages for such injuries."

This instruction ought not to have been given for two reasons.

1. So far as it holds defendant liable for injuries resulting from her stepping upon the ice upon the sidewalk, it is not pertinent to the cause of action set out in the petition, which is for injuries sustained by plaintiff stepping in a hole in the broken sidewalk at a place which was free from snow and ice. The thought of the petition seems to be, that plaintiff found it necessary or convenient in order to avoid the snow and ice to go upon the side of the walk which was defective on account of the hole therein. There is no claim that the injury resulted from stepping on the ice.

2. The evidence does not show that the injury directly resulted from the snow and ice; on the contrary it does show that it resulted from a fall caused by plaintiff stepping into a hole. The instruction is clearly misleading and prejudicial, as the jury were directed to consider matters not found in the petition or evidence.

II. Another instruction, given to the jury, is in the following language:

"15. If you find from the evidence that the center of the sidewalk was icy and slippery, and the space between such strip and the edge of the walk was free from ice and was wide enough to allow one to safely walk thereon, the plaintiff, without previous notice of any defect in such space, had the right to assume that it was free from dangerous breaks or holes, and ordinary care on her part did not require her to be on the lookout for such breaks or holes."

This instruction holds, in effect, that the plaintiff when going upon the side of the walk was not required to exercise care to avoid stepping into the hole—the language of the in-

Sikes v. Town of Manchester.

struction being that "ordinary care on her (plaintiff's) part did not require her to be on the lookout for such holes or breaks." The law is that if the hole could have been discovered by the exercise of ordinary care plaintiff could not have recovered for injuries resulting from stepping into it. Ordinary care is to be exercised at all times and in all places by persons using sidewalks. Surely it cannot be claimed as a matter of law that the plaintiff, finding she could not safely go in the middle of the walk, could use the side of it without being "on the lookout for such breaks and holes." The most that can be claimed is that possibly it could have been left to the jury to say whether ordinary care required plaintiff, while upon the side of the walk, "to be on the lookout for such breaks and holes."

Other questions discussed by counsel need not be considered, as for the error in giving the instruction above quoted the judgment of the District Court must be

REVERSED.

SIKES v. TOWN OF MANCHESTER

1. **CITIES AND TOWNS: OBSTRUCTIONS IN STREETS: LIABILITY FOR.** A town is not liable for an obstruction in a street unless it be shown that, through its officers, it had notice of the obstruction, or the obstruction had existed so long as to raise a presumption that knowledge thereof was possessed by the town officers; but the fact that a sleigh had stood ten or fifteen minutes in a street will not raise a presumption of such knowledge.
2. — : — : WHAT CONSTITUTES AN OBSTRUCTION. A sleigh standing ten or fifteen minutes in a village street for the purpose of unloading goods, ought not to be regarded as an obstruction; and it is not clear that, under any circumstances, a village street would in law be regarded as obstructed by the fact that one-third or one half of it was occupied during the greater portion of the day by the vehicles of farmers, while their teams were feeding at an adjacent stable.

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Sikes v. Town of Manchester.

Appeal from Buchanan Circuit Court.

THURSDAY, JUNE 15.

ACTION to recover for personal injuries sustained by plaintiff from alleged obstructions allowed in a street of the town. After the evidence was all in, the court directed the jury to return a verdict for defendant for the reason that plaintiff failed to present any evidence upon which defendant can be held liable. There was a verdict and judgment entered accordingly for defendant. Plaintiff appeals.

E. M. Carr and Bronson & LeRoy, for appellant.

A. L. Blair and Calvin Jordan, for appellee.

. BECK, J.—I. The following agreed statement of facts was submitted by plaintiff to sustain her claim to recover in this case.

“1st. The town of Manchester, defendant, is an incorporated town, legally organized under the laws of Iowa.

“2d. That on the northeast corner of Main and Tama streets, in said town, is the livery stable of the defendant, Marcus Sheldon, said stable extending north on Tama street from Main a distance of 115 feet, and fronting on Main street east, from Tama, 66 feet.

“3d. That Main and Franklin streets are the principal thoroughfares leading to and from said town.

“4th. That Main street is 80 feet in width, and in front of said stable, across its whole front, is a driveway extending into the street a distance of 16 feet, and so constructed on a level with the sidewalk that vehicles can safely be driven from the street into said stable, the driveway acting as a bridge or covering over the gutter.

“5th. That along the north side of Main street, and to the east of said driveway, is a sidewalk extending into the street a distance of 6 feet.

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“6th. That said Main street, on both its north and south sides, in front of said barn, was for at least a year next preceding the day plaintiffs received the injuries complained of, used by farmers and others as a place to leave their wagons and sleighs while their teams were feeding in said stable, and such vehicles would occupy from one-third to one-half of the street between the gutters during the greater portion of the day time, different parties so leaving their vehicles on each day.

“7th. That the injuries received by plaintiffs were received on the 1st day of January, 1881, about 4 o'clock in the afternoon of said day.

“8th. That at the time there were two sleds on the south side of said street, opposite the west front door of said stable, both extending lengthwise along Main street, and close to the gutter, and on the north side of said street, and in addition to the sleigh which caused the injury complained of, was a sleigh, the back end of which was about 20 feet east from the east end of the driveway, in front of the stable, the outside of said sleigh being about 15 feet south from the north line of said street.

“9th. That about ten or fifteen minutes before said injuries were received one Wm. Franks, then in the employ of defendant, Marcus Sheldon, backed a sleigh belonging to the said defendant up against the sidewalk on the east side of the driveway in front of said stable, and in the angle between the driveway and sidewalk, the box of said sleigh being nearly north and south, with the tongue turned to the east, lengthwise with the street, and nearly at a right angle with the box, the end of the tongue projecting into the street, about one foot south of the south line of the driveway in front of the stable, or about 17 feet from the north line of said street. That said Franks unhitched the horses from said sleigh, leaving the same in the position above indicated, with the tongue suspended by the middle ring of the neck-yoke, said neck-yoke standing one end on the ground. He

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then unloaded the sleigh. The sleigh mentioned in this paragraph is an additional sleigh to those described in paragraph 8, and is the sleigh against which the horse ran, causing the injuries to plaintiffs.

"10th. That the plaintiffs were walking toward said stable from the east, on said sidewalk, and when some 25 or 30 feet east of said stable they saw a runaway horse coming down behind them from the east, in the center of the street, towards the stable; that they walked towards said stable, looking back to see said horse, until they came within 5 or 6 feet of the southeast corner of the stable, when they turned, fronting the south, and stopped and looked toward and at the running horse; that the running horse had the shafts and cross-bar of a cutter attached to him, and as he came down the street, and nearly opposite to where the plaintiffs were standing on the sidewalk, he turned suddenly to the right, toward the sidewalk, and jumped over the tongue of the sleigh described in paragraph 9 hereof, the cross-bar of the cutter catching the tongue and neck-yoke of the sleigh, and with such force as to break the cross-bar and throw about half of it, together with the neck-yoke of the sleigh, against the heads of the plaintiffs, neither the horse or anything attached to him striking them, and the injuries received by plaintiffs were received in this manner.

"11th. That along the north side of said Main street, and immediately east of stable, for a distance of more than 30 feet, there is a tight board fence.

"12. That Main street, in said town, is a well graded street, and when not obstructed can be traveled with safety by teams its whole width between the gutters."

It was shown that Main street was 80 feet wide; the sidewalks to the outer edge of the gutters are 16 feet wide, leaving an open road-way between the gutters of 48 feet. Other evidence was introduced tending to show the nature and extent of plaintiff's injuries and the damages sustained by her. No other evidence was introduced in support of her claim

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to recover. Thereupon the court directed the jury to return a verdict for defendant for the reason that upon the undisputed facts no liability of defendant is shown.

We think the instruction is correct and was demanded by the law of the case.

II. The town would not be liable for an obstruction in 1. CITIES and towns: obstructions in streets: liability for. the street, unless it be shown that, through its officers it had notice of the obstruction, or it had existed so long as to raise a presumption that knowledge thereof was possessed by the town officers. In this case the theory of plaintiff is that the sleigh and its tongue were obstructions which caused plaintiff's injury. Let this be admitted. But there is no evidence tending to show that the town had notice thereof through the knowledge of its officers. The sleigh had been standing at the place for no more than ten or fifteen minutes. It cannot be claimed that this brief time would raise a presumption of knowledge of the obstruction on the part of the town officers. The evidence failed to present a case of liability of the defendant.

III. It appears too that a sleigh standing for ten or fifteen minutes for the purpose of unloading goods, ought not to be regarded as an obstruction to a village street. 2. ____: ____ what constitutes an obstruction. The streets of a town exists for the very purpose among others of permitting the transportation of goods and the like in vehicles. They, of course, may be unloaded upon the sidewalks. *Haight v. City of Keokuk*, 4 Iowa, 199.

IV. If it be admitted that the fact disclosed by the agreed statement that the street was habitually occupied by farmers' vehicles while their teams were feeding, established an obstruction of the street; yet such obstruction did not cause or contribute to the injuries complained of in this case.

Besides it is not clear that under any circumstances a village street would, in law, be regarded as obstructed by vehicles standing for the purpose, and in the manner, and to the extent described in the agreed statement of facts. It is very

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certain that it would be well for the towns and villages of the State to have their streets freely used for such purposes by farmers who are trading there. We think it is a common thing in all the villages of the State.

AFFIRMED.

59	70
105	449
59	70
124	352
59	70
131	18
59	70
141	51

SCRIPTURE V. BURNS ET AL.

1. **Mandamus: object of the action.** The proceeding by *mandamus* is intended to compel officers and others to act in the discharge of their duties, but not to review their action when discretion may be exercised, or when it depends on facts to be ascertained and determined by them.
2. **School Directors: Renting School-House: Discretion: Mandamus.** School directors may, in a proper case, in the exercise of their lawful discretion, cause the school to be taught in a rented house instead of the public school building, and their action in so doing cannot be reviewed in the proceeding by *mandamus*.
3. ——: **Sectarian Instruction: Mandamus.** Where plaintiff, a private person, sought by writ of *mandamus* to compel school directors to observe and enforce the law forbidding sectarian instruction in the public schools, *held* that the relief was properly refused, because it did not appear that plaintiff had demanded of the directors the performance of the duty sought to be enforced. Code, section 3378.

Appeal from Dubuque District Court.

THURSDAY, JUNE 15.

MANDAMUS. Upon a trial on the merits the District Court dismissed plaintiff's petition; he now appeals to this court. The facts of the case are fully stated in the opinion.

M. H. Beach, for appellant.

Pollock & McNulty, for appellees.

BECK, J.—I. The petition shows that plaintiff is a citizen of this State and a resident of the school district of which defendants are directors, and has children that are lawfully

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entitled to attend the public schools taught therein. It is further alleged that the district owns a public school-house situated in the center of its territory; that defendants have authorized and permitted school to be taught in a private school-house owned by the bishop of the Catholic church for the Diocese of Iowa; that plaintiff in writing has requested the defendants to require the school to be taught in the public school-house and that, although the defendants have had official meetings since the service of the plaintiff's written requests, they have refused to act thereon and have not given consideration thereto. The petition also shows that defendants and their predecessors have permitted the Catholic catechism to be studied, taught, learned and recited in the public schools of the district, and that defendants have refused and failed to observe and enforce the law forbidding such instructions in the public schools of the State. The petition prays that defendants may be required to take action upon plaintiff's request above stated, and that, by a peremptory writ of *mandamus*, they be required to observe and enforce the laws of the State, forbidding children to be taught, in the public schools, the creed of the Catholic or any other church.

The defendants admit that they have permitted a public school to be taught in the house referred to in the petition, which has been rented for the use of the school district, for the reason that by so doing, defendants could maintain a school for ten months in the year instead of six, the public money being sufficient to maintain a school for six months, and for four months it is supported by private contributions. The answer inferentially admits that, during the four months when the school is supported by private contributions, the Catholic creed is taught therein. It is averred in the answer that since the commencement of this suit defendants have, at the official meeting of the school board, acted upon plaintiff's written request and refused to comply therewith. Other allegations of the pleadings need not be recited. The District Court dismissed plaintiff's petition, requiring the defendants

Scripture v. Burns.

to pay all costs except the witnesses attending the term, and refused to hear evidence supporting the allegations of the petition to the effect that the Catholic creed was taught in the school.

II. The decision of the District Court was doubtless based upon the ground that the defendants had acted upon plaintiff's request, and that in this proceeding their ac-

1. **MANDAMUS:** object of the action. tion cannot be reviewed, and that as no demand required by Code, section 3378, was alleged in the petition or shown by plaintiff's requiring them to forbid the teaching of the Catholic creed, the action cannot be maintained as to that branch of the case. The decision of the District Court is correct, and is well supported upon these grounds. The proceeding by *mandamus* is intended to compel officers and others to act in the discharge of their duties and trusts imposed upon them. It is not designed to review their action when discretion may be exercised, or when it depends upon facts to be ascertained and determined by them.

III. It cannot be doubted that the directors of a school district may, in a proper case or when the public school-house

2. **SCHOOL DIRECTORS:** renting school-house: discretion: mandamus. is out of repair or insufficient, and in other cases when the best interest of the school would be subserved thereby, cause the school to be taught in a rented house instead of the public school building. Their action in such a case would depend upon the determination of facts and the exercise of discretion which they may lawfully exercise. But the action in such a case may be reviewed by proper proceedings before a tribunal having jurisdiction thereof; it cannot be done in the proceeding by *mandamus*.

IV. The relief sought by plaintiff on the ground that the defendants unlawfully permitted the creed of the Catholic church to be taught in their school was properly refused in this proceeding, for the reason that plaintiff did not aver and show that he had demanded of the defendants that they perform their duty by

3. **_____ : sectarian instruction : mandamus.**

Smith v. B., C. R. & N. R. Co.

prohibiting the acts complained of as illegal. This is required by the statute, to authorize a writ of *mandamus*.

It is our opinion the judgment of the District Court ought to be

AFFIRMED.

SMITH v. B., C. R. & N. R. Co.

1. **Railroads: INJURY BY CO-EMPLOYEE: RULE STATED.** To entitle an employee of a railroad company to recover for personal injuries inflicted through the negligence of a co-employee, it must be shown that his employment was connected with the operation of the railway. Code, § 1307.
2. _____: _____: RULE APPLIED. Where plaintiff's petition failed to aver, and the evidence failed to show, that he was anything more than a section hand, and that, when injured, he was engaged in loading a car, *held* that this service did not pertain to the operation of the road, and that he could not recover for injury caused by the negligence of his co-employee.
3. **Practice: INSUFFICIENT PETITION: ADVANTAGE TAKEN OF, HOW.** If the facts stated in the petition do not entitle plaintiff to relief, and defendant fails to demur, advantage may be taken of the defect by motion in arrest of judgment, or the court may, at the trial, as in this case, direct the jury to find for the defendant.

Appeal from Fayette District Court.

THURSDAY, JUNE 15.

ACTION to recover for personal injuries sustained by plaintiff while in the employment of defendant, resulting from the negligence of a co-employee. The court instructed the jury to return a verdict for defendant upon the evidence submitted in the case, which was done, and a judgment was rendered accordingly, from which plaintiff appeals.

Ainsworth & Hobson and L. M. Whitney, for appellant.

J. & S. K. Tracy, for appellee.

Smith v. B., C. R. & N. R. Co.

BECK, J.—I. The petition alleges substantially that plaintiff was employed as a section hand by defendant to work upon its railroad, and while engaged in loading car timbers at a switch of the railroad, was, without his fault, injured through negligence of a co-employe. These facts alleged in the petition are established without contradiction by the evidence of plaintiff. There is no testimony whatever tending to show the character of plaintiff's employment and the services which he was required to perform, further than that he was a section hand, and at the time of the accident, engaged in loading car timbers. It is not shown that his employment or the special service in which he was engaged at the time, required him to go upon the cars, ride upon them, or in any way assist in the operation of the trains upon the road.

The court instructed the jury that upon the allegations of the petition, the admissions of the answer and the undisputed facts proved at the trial, the plaintiff was not entitled to recover, and directed a verdict for defendant. The questions raised by the assignment of errors all pertain to the rule of the law as recognized in this instruction. It therefore demands our attention.

II. To entitle an employe of a railroad company to recover for personal injuries inflicted through the negligence of a co-employe, it must be shown that his employment was connected with the operation of the railway. Code, § 1307; *Schroeder v. The C., R. I. & P. R. Co.*, 41 Iowa, 344; Same Case, 47 Id., 375; *Deppe v. C., R. I. & P. R. Co.*, 36 Id., 52.

We are to determine whether the record shows that plaintiff's employment was of this character.

It is shown by the record, and nothing more, that plaintiff was a section hand, and when injured was engaged in loading a car. This service did not pertain to the operation of the railway. We held in *Schroeder v. C., R. I. & P. R. Co.*, 41 Iowa, 344, that plaintiff, who was engaged in loading upon

Smith v. B., C. R. & N. R. Co.

defendant's cars the timbers of an abandoned bridge, as shown by the pleadings, was not employed in the use and operation of the railway. The facts of that case and this are alike.

In *Deppe v. C., R. I. & P. R. Co.*, 36 Iowa, 52, and in *Schroeder v. C., R. I. & P. R. Co.*, 47 Iowa, 375, the duty of the employes in the respective actions, requires each to ride upon the cars. This fact distinguishes this case from those and from *Schroeder v. C., R. I. & P. R. Co.*, 41 Iowa, 344.

We conclude that upon the facts shown in the record plaintiff was not an employe engaged in the use and operation of the railroad, and cannot, therefore, recover for the negligence of his co-employe.

III. Counsel for plaintiff insist that as the petition shows the character and nature of plaintiff's employment, which was not connected with the operation of the railroad, the defendant should have assailed the petition by demurrer, and his failure to do so waived objection to the insufficiency of the cause of action. The position is not correct.

If the facts stated in a petition do not entitle plaintiff to relief, advantage may be taken of the defect by motion in arrest of judgment. The court may at the trial in such a case direct the jury to find for defendant. Code, § 2650; *Seaton & Spaan v. Hinneman*, 50 Iowa, 395; *Edgerly v. Farmers' Ins. Co.*, 43 Iowa, 587.

The foregoing discussion disposes of all questions in the case. The judgment of the District Court is

AFFIRMED.

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Gilman, Adm'r, v. Donovan.

GILMAN, ADM'R, v. DONOVAN.

1. **Practice: PETITION FOR NEW TRIAL: CHANGE OF VENUE.** Where a proceeding was pending to vacate a judgment and for a new trial, under section 3145, subdivision 6, of the Code, it was error for the court to grant a change of venue. The proceedings authorized under this statute are in the nature of a writ of error *coram nobis*, and are provided for the review of a case after final judgment in the very court wherein it was rendered.
2. **Practice in the Supreme Court: UNLAWFUL CHANGE OF VENUE: SUBSEQUENT PROCEEDINGS NOT REVIEWED.** Where this court has determined that an order granting a change of venue was without authority of law, it will not go farther, and review the unauthorized proceeding in the case subsequent to the change of venue.
3. **—: POINTS NOT MADE BY COUNSEL.** While we are not authorized to decide a case upon a point not made by counsel, we are not required to disregard a valid objection, simply because we cannot concur in the *reasons* assigned for its support by the counsel who urge it.

Appeal from Franklin Circuit Court.

THURSDAY, JUNE 15.

THIS is a proceeding under the statute by petition, to set aside the judgment and asking for a new trial in an action at law, wherein judgment was rendered for plaintiff. An order was entered granting a new trial from which plaintiff appeals. The cause has before been in this court. See 53 Iowa, 362.

F. Gilman, appellant, pro se.

Kellam, King & Henley and J. H. Scales, for appellee.

BECK, J.—I. The action wherein a new trial is sought was pending in the Circuit Court and upon being remanded by *procedendo* from this court, the defendant made an application for a change of venue, on the ground of the prejudice of the judge, which was allowed, and the action was sent to the District Court, plaintiff excepting thereto.

Gilman, Adm'r, v. Donovan.

As is shown by the opinion of this court rendered when the case was before here, the new trial was sought upon the ground that the plaintiff died before the judgment was rendered. Under our statutes the death of a party is sufficient ground for setting aside a judgment and allowing a new trial. Code, § 3154, ¶ 6. The proceedings in such cases are by petition, setting out proper facts, and are to be commenced within one year after the judgment in the case sought to be set aside was rendered, and are prosecuted in the manner prescribed by the statute. Code, §§ 3157-8.

II. We are to inquire whether the change of venue was lawfully allowed in this case. The proceeding by petition to
1. PRACTICE: set aside a judgment and for a new trial is authorized by Code, section 3154. The part thereof material to our present inquiry is in the following language:

"The District or Circuit Court in which a judgment has been rendered, or by which, or by the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order: * * * * * * * *."

"6. For the death of one of the parties before the judgment in the action * * * * * * * *."

It will be observed that the proceedings authorized under this statute are in the nature of a writ of error *coram nobis*, and are provided for the review of a case after final judgment in the very court wherein it was rendered. By the express terms of the statute quoted, jurisdiction of this proceeding is conferred upon the court wherein the judgment was rendered; all other courts by these terms are excluded. *Expressio unius est exclusio alterius.*

The proceeding is not in the nature of a new or independent action, but is supplementary and intended to correct errors committed in the trial of a cause and the rendition of the judgment. It is of the same character as all proceedings for new trials, the correction of records, etc., wherein the court

Gilman, Adm'r, v. Donovan.

committing the errors corrects them. In this proceeding the law requires the very court rendering judgment to review its decision; the case cannot therefore be transferred to another court for that purpose.

It follows that the statute authorizing change of venue is not applicable to the supplementary proceeding before us in this case.

The Circuit Court is the forum in which the issues upon plaintiff's petition should have been tried. Plaintiff has the right to a trial of these issues there. That he may not be deprived of that right the cause must be remanded to that court. *Bennett v. Carey*, 57 Iowa, 221.

III. Defendant moved to strike from the files plaintiff's abstract for the reason that the evidence and rulings of the court are not properly presented by bill of exceptions or certificate. We need not examine the motion of plaintiff or the objection raised therein. There is no denial of the abstract so far as it shows the change of venue and plaintiff's exception thereto.

As for the error in changing the venue, the judgment of the court must be reversed; other rulings we cannot be required to consider. The language we use in *Bennett v. Carey, supra*, upon a point identical to the one now under consideration, may be here repeated: "All proceedings of the case following and including the change of venue, were without authority of law. We cannot be required to review these unauthorized proceedings" * * * * *

It is therefore plain that we are authorized to review the case no farther than to pass upon the order making the change of venue."

IV. It is proper to observe here that plaintiff's counsel, while urging the point we have decided in his assignment of ^{a. —: point errors and argument does not base it upon the not made by counsel.} reasons we have presented in support of our conclusion. While we are not authorized to decide a case upon a point not made by counsel, we are not required to disregard a

Green v. Blunt.

valid objection on the ground that we cannot concur in the reason assigned for its support by the counsel who urge it.

The judgment of the District Court is

REVERSED.

GREEN v. BLUNT ET AL.

1. **Principal and Surety: ABANDONMENT OF LEVY: RELEASE OF SURETY.** Where there was judgment against a principal and surety, and execution had been levied on exempt property of the principal, to which levy the principal objected, and the judgment creditor thereupon ordered the property released and the levy discharged, *seems* that such act of the judgment creditor did not discharge the surety.
2. **Execution: EXEMPTION: WAIVED IF NOT ASSERTED: EVIDENCE CONSIDERED.** Where exempt property of an execution debtor has been levied upon, he must, in some way, indicate his intention to rely on his right to hold the property as exempt; otherwise he will be deemed to have waived such right; but upon consideration of the evidence in this case, it was held that the execution defendant had sufficiently asserted his intention to hold the property as exempt.

Appeal from Fayette Circuit Court.

THURSDAY, JUNE 15.

ACTION IN CHANCERY. Upon a trial on the merits plaintiff's petition was dismissed; he now appeals to this court.

Ainsworth & Hobson, for appellant.

J. H. Rodgers & Son, for appellee.

BECK, J.—I. The petition alleges that defendant, Blunt, recovered a judgment against one Ballard as principal, and plaintiff as surety, wherein an execution was issued which was levied upon a span of mules, a set of double harness and a wagon, all the property of Ballard; that Blunt, without plaintiff's consent, ordered the release of the property and the

Green v. Blunt.

discharge of the levy; that Ballard is insolvent and that subsequently Blunt caused another execution to be issued, which is in the hands of defendant, Farr, for service. Plaintiff claims that on account of the levy of the execution and the discharge thereof he is released.

It is pleaded and shown by Blunt that the first execution was levied upon the mules and other property without his consent or direction, and that all of the property was exempt from execution, being the team, wagon, etc., by the use of which Ballard habitually earned his living. It is further pleaded and shown that the property was mortgaged, and was not, therefore, subject to the execution. But it is claimed by the plaintiff that the levy was valid and bound the property, for the reason that Ballard waived the exemption by failing to set it up and object to the levy on the property at the time, and that the levy was made with the consent of the mortgagee.

II. That the property was exempt from the execution is not a matter of dispute. The question in issue is, did Ballard waive the exemption by assenting thereto or by failing to interpose objection to the levy on the ground of the exemption?

It was the duty of Ballard, did he intend to rely upon his right to hold the property exempt from the execution, to indicate in some manner his purpose to do so. If he failed to make such a claim he cannot afterwards set it up. *Richards, Crumbaugh & Shaw v. Hains*, 30 Iowa, 574; *Angell v. Johnson*, 51 Id., 625.

We think the preponderance of the evidence supports the conclusion that Ballard did object to the levy upon the property and set up a claim based upon the exemption. He so testifies positively. The sheriff states that Ballard, when the levy was made, went away saying, "I will go and see about it, or I will go and see an attorney about it." Another witness who was present at the time of the levy, states that Ballard went away but made no declaration or statement. Con-

Darr v. Darr.

sidering the statement of the sheriff alone, we are warranted in the conclusion that Ballard indicated his objection to the levy. His declaration that he would see about it, or see an attorney about it, expressed the thought that he did not intend to abandon his rights and did intend to stand upon them. His positive testimony leaves no doubt in our minds upon this question. The case, we think, is not within the rule of the decisions above cited.

We need not inquire whether the mortgagee assented to the levy. As it could not stand for the reason that the property is exempt, Blunt was authorized to discharge it.

The judgment of the Circuit Court must be

AFFIRMED.

DARR v. DARR.

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1. **Agent to Collect Notes: NEGLIGENCE. FACTS NOT CONSTITUTING.** Where defendant received from his brother, for collection, certain notes which did not fall due till after the brother's death, and the defendant continued to hold the notes until the makers became insolvent, no demand having been made for the notes by the brother's foreign administrator, held that defendant's agency ceased with the death of his brother, after which he had no authority to collect the notes, and that he was not liable to the brother's only heir for neglect in not having an administrator of the brother's estate appointed in this State, and that he was not liable as an executor *de son tort*.

Appeal from Linn District Court.

THURSDAY, JUNE 15.

ACTION AT LAW to recover the amount and value of certain promissory notes received by defendant for collection from the father of plaintiff, which he negligently failed to collect and refused to deliver them to the guardian of plaintiff until the makers became insolvent, whereby they were wholly lost to plaintiff. The cause was tried to the court without a jury and judgment was rendered for plaintiff. Defendant appeals.

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Darr v. Darr.

Preston Bros., for appellant.

J. O. Davis, for appellee.

BECK, J.—I. The District Court made no special findings, but, in our opinion, the evidence establishes the following facts:

1. Plaintiff is the only heir of Andrew Darr, a brother of defendant, who died in 1859 in Missouri.
2. In 1858 or 1859 defendant received the notes in controversy from plaintiff's father who was, at the time, about to remove to Missouri, with authority to collect them. The notes did not become due until after Andrew Darr's death. At the maturity of the notes, and, for some time after, the makers of the notes were solvent.
3. Administration of Andrew's estate was allowed in Nebraska, and the notes were reported as assets of the estate there, and the administrator collected a part of one of these notes.
4. Plaintiff's grandfather was appointed his guardian in Missouri.
5. Defendant collected no part of the notes. In 1879 he delivered them to plaintiff, who then had reached his majority.
6. The makers of the notes are and have been for many years insolvent.
7. No demand was made upon defendant by the administrator of the estate of Andrew for the notes. In 1860 the grandfather of the plaintiff had some correspondence with defendant, who suggested the appointment of a guardian in this State. It does not appear whether the grandfather at this time had been appointed guardian in Missouri.

II. These facts support the judgment of the District Court. Defendant's agency was terminated by the death of his brother, and afterwards he had no authority to enforce the collection of the notes. They were assets of his brother's estate and should have gone into the hands of the adminis-

Green v. Ronen.

trator. Defendant is not liable for negligence in not causing the appointment of an administrator in this State.

There is no ground for holding defendant liable as an executor *de son tort*. He in no manner intermeddled in the affairs of the estate, and did not interfere to prevent the administrator recovering the possession of the notes, nor to prevent administration upon the estate in Iowa.

We conclude, the judgment of the District Court ought to be

AFFIRMED.

GREEN v. RONEN ET AL.

1. **Practice in the Supreme Court: PARTIAL ABSTRACT OF EVIDENCE.** Where the abstract does not show that it contains all the evidence, and the appellee moves to dismiss the appeal on that ground, the motion must be sustained.
2. **—: NO JUDGMENT APPEALED FROM: APPEAL DISMISSED.** This court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken, and the judgment must be affirmatively shown; and, in the absence of such showing, the case will be dismissed, even though the parties fail to raise the objection; for, being jurisdictional in its nature, the parties cannot waive it by silence or consent.

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Appeal from Jones Circuit Court.

THURSDAY, JUNE 15.

ACTION IN CHANCERY. The petition alleges that plaintiff contracted in writing with defendant Heisey for the purchase of certain real estate, and that Heisey afterwards sold it to defendant Ronen, who had actual knowledge of the sale to plaintiff. The petition prays that the specific performance of the contract be enforced and an amended petition asks that, in case it be found such relief cannot be granted, a judgment be entered against defendant Heisey for the damages to which plaintiff is legally entitled under the law. Plaintiff brings the case by appeal to this court.

Green v. Bonen.

Remley & Ercanbrack and Sheean & McCarn, for appellant.

Ezra Keeler, for appellee.

BECK, J.—The abstract upon which the case is submitted for trial in this court fails to show that a decree or judgment, either final or interlocutory, was rendered in the case. Not one word is found in any manner indicating that a decision of any question was made by the court below. The abstract contains the pleadings and evidence and a copy of the judge's certificate upon which the cause was tried, and nothing more. The counsel of the respective parties present arguments upon the merits of the case as disclosed by the testimony. From the argument of appellant we learn that the abstract is agreed upon.

Counsel for defendants move to dismiss the appeal on the ground that the abstract fails to show that it contains all the evidence and that any judgment was entered in the case. The objection first mentioned may be urged upon motion to dismiss or affirm as we have recently ruled. The abstract does not show that it contains all the evidence. The motion, therefore, must be sustained.

The other ground of the objection may be considered either upon motion or upon the submission, as it pertains to our jurisdiction to determine the case. We can entertain an appeal only when a judgment has been rendered from which an appeal may be taken, and the judgment must be affirmatively shown. And we will dismiss the case, even though the parties fail to present the objection to us, for being jurisdictional in its nature the parties cannot waive it by silence or by consent. This court cannot try a case wherein no judgment has been entered in the court below. These points were ruled by this court in *Pittman v. Pittman et al.*, 56 Iowa, 769. Appeal must be

DISMISSED.

Barnhard v. Coppess.

BARNHARD V. COPPESS.

1. **Appeal: NO QUESTION OF LAW AND NO INJUSTICE TO APPELLANT: JUDGMENT AFFIRMED.** On an appeal from an action in chancery to settle a partnership, triable *de novo* in this court, where there is no point of law involved and the judgment does the appellant no injustice, the judgment will be affirmed.

Appeal from Jones District Court.

THURSDAY, JUNE 15.

ACTION in chancery to settle a partnership between the parties, and to recover an amount due plaintiff from defendant on account of the partnership transactions, and other sums arising upon other transactions. There was a decree for plaintiff in the sum of \$867.14. Defendant appeals.

Sheean & McCarn, for appellants.

J. W. Jameson, for appellee.

BECK, J.—The case is triable *de novo* in this court. There is not a single point of law in the case in dispute or involved in doubt. The evidence is conflicting, but probably no more so than is usually found in this class of cases. The decision of the respective claims of the parties rests wholly upon a statement of their accounts and of the accounts of the partnership. This requires the inspection of the evidence relating to each, and to the items in dispute. This having been carefully done reveals a result, varying in a trifling sum only, from the amount found due the plaintiff by the court below. We reach the conclusion that the judgment appealed from is correct. It surely does defendant no injustice. If we were to change it at all, we would allow a little more to plaintiff; but, as he does not complain, the judgment cannot be disturbed.

A discussion of the testimony would not prove of interest

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or profit to any one, nor are we accustomed to set out the evidence in cases of this kind. The judgment of the District Court must be

AFFIRMED.

WHEELER v. BAKER.

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1. **Contract: WRITTEN LEASE VARIED BY SUBSEQUENT PAROL: EVIDENCE: TENDER.** Where in an action for rent upon a written lease, providing for the payment of \$20 per month, the defendant sets up a subsequent parol contract providing for the payment of only \$16 $\frac{2}{3}$ per month, the burden is upon him to establish the subsequent parol contract and the consideration on which it is based; and this is not done by proof of the fact that plaintiff accepted \$16 $\frac{2}{3}$ per month for a part of the time; nor is plaintiff's action barred by the tender of \$16 $\frac{2}{3}$ per month for that portion of the term for which the suit is brought.

Appeal from Winneshiek Circuit Court.

THURSDAY, JUNE 15.

THE plaintiff claims of the defendant the rent of certain premises for the months of July and August, 1880, at the rate of \$20 per month, under a written lease, executed October 1st, 1878. The defendant for answer alleges that after the making of the written contract sued upon, he and plaintiff entered into another and different verbal contract, fixing the monthly rent of said premises at \$16 $\frac{2}{3}$ per month, that defendant and plaintiff have acted upon and treated said verbal contract as their contract, and defendant has paid the sum of \$16 $\frac{2}{3}$ per month, which plaintiff has accepted in full payment; and that defendant, on the 18th day of June, 1880, tendered to said plaintiff the rent of said premises from July 1st to October 1st, 1880. The plaintiff, for reply, admitted that defendant has paid the rent on said premises to July 1st, 1880, at the rate of \$16 $\frac{2}{3}$ per month, but averred that the payments were made on the written contract, and accepted by

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the plaintiff in lieu of the \$20 per month stipulated, without waiving any right to demand \$20 per month. The plaintiff also admitted that the defendant, June 18th, 1880, offered her \$50, if she would execute to defendant a release from future liability on the written contract, which she refused. The testimony being introduced, the court withdrew the cause from the jury and rendered a judgment in favor of the plaintiff for \$43.38, the amount of two months rent at \$20 per month, and interest. The defendant appeals. The facts are stated in the opinion.

L. Bullis, for appellant.

Willett & Willett, for appellee.

DAY, J.—The amount in controversy being less than one hundred dollars the court certified the questions upon which our opinion is desired, as follows:

“1st. Under the issue was the following evidence adduced by defendant such as entitled him to have it passed upon by the jury?

“2d. Was it evidence of an alteration of the terms of the lease?

“3d. Had the judge the lawful right to take the cause from the jury, strike out the evidence, and give the plaintiff judgment at the rate of \$20 per month?

“4th. Was that evidence competent and proper to be submitted to the jury?

“5th. Was the tender shown by the evidence sufficient to bar the cause of action?

“6th. With that evidence, had plaintiff a cause of action on his lease alone; were not the terms of it changed by the parties to it; and did not, in law, that change make a new and different contract from that sued on?”

The evidence referred to in this certificate is as follows:

The plaintiff introduced a written lease for the premises in question, executed between S. H. Wheeler and G. Baker, for

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the term of one year, commencing October 1st, 1878, at the agreed rent of \$240, the sum of \$20 being payable on the first day of each month, for the month, the said Baker having the privilege of the building for five years. The plaintiff also proved that the defendant occupied the premises till June 18th, 1880.

The defendant, to establish the change in the written contract alleged in his answer, introduced fifteen receipts. Number one is as follows: "Received of G. R. Baker, \$66.66, credit account and fifty dollars cash, for rent on store room and cellar, from November 1st, 1879, to June 1st, 1880, at \$16.66 per month. Two hundred dollars per year.

"S. H. WHEELER."

Receipt number two is by the same to the same, dated June 1st, 1880, for rent on store room and cellar to July 1st, 1880, \$16.67. Receipt number three is by the same to the same, dated October 13th, 1879, for rent on store room and cellar to November 1st, 1879, \$16.67. The remaining twelve receipts are monthly receipts for \$20 dollars cash, in full for a month's rent on store room and cellar. The defendant thereupon testified as follows:

"I tendered plaintiff money June 18th, 1880, after I had completed moving. The account and the money together was \$50. I have been ready ever since then to pay \$50, or its equivalent; it has never been called for. When this suit was commenced I held the \$50 dollars in readiness for plaintiff, and paid it into court nearly a year ago. Since the making of the lease I was to pay plaintiff \$16 $\frac{2}{3}$ per month. There was no contract other than this acted on. I paid \$16 $\frac{2}{3}$ per month since the lease; it was accepted by plaintiff in full payment for the rent. The receipts introduced in evidence are for the rent of that building during the time for which they purport to be, and since the date of the lease. In receipts where \$20 is stated I paid but \$16 $\frac{2}{3}$; that was all plaintiff asked. Mrs. Wheeler, plaintiff, knew of the payments of \$16 $\frac{2}{3}$ per month, and she assented to them as being the correct

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amount of rent per month due. Plaintiff signed every one of these receipts herself, and assented to them as correct. Where the \$20 was mentioned in the receipts she knew that she received only \$16 $\frac{2}{3}$; she did not exact nor demand more than \$16 $\frac{2}{3}$ for rent for any month.

"The talk between me and her, since the lease, of what I was to pay her a month, was \$16 $\frac{2}{3}$. Plaintiff has never since the date of the lease demanded of me more than \$16 $\frac{2}{3}$ per month; the first that I knew she claimed more than that was in her notice of suit in this case; she never personally claimed more than \$16 $\frac{2}{3}$ per month.

"I quit the premises on June 18th, 1880.

"On the first of June, at time of the last payment, I notified plaintiff that I was going to quit the premises. She said 'well, as you always rented by the year we shall expect you to pay the rent for the year.' I answered, I expect to pay that, Mrs. Wheeler.

"That was when I paid the last rent. I went on and moved out. When I told her I was going to quit she made no objection, but said she would expect the rent for that year. The \$50 tendered pays the rent for the balance of the year.

"No other rate was talked of than what I had previously paid, \$16 $\frac{2}{3}$ per month. I paid her at that time \$16 $\frac{2}{3}$, and took receipt for June, one month's rent, 1880.

"My tender extended to the first day of October, 1880. I have always been ready to pay that \$50. It is now in court and has been since last of January.

"This notice of leaving was eighteen days before I did leave. There was not a word of objection to my quitting during that eighteen days, nor until after I had left, nor until I had tendered the \$50.

"There was an agreement with me and plaintiff since the execution of the lease of \$16 $\frac{2}{3}$ and was made before and after the lease. There was nothing said any further than \$16 $\frac{2}{3}$ was the satisfactory rent. They said they would take \$16 $\frac{2}{3}$ per month and be satisfied. That was all that was said. There

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was never any claim made by plaintiff for more than \$16 $\frac{2}{3}$ per month; that is all that plaintiff claimed, and I paid that right along. She accepted it as the rent for the building; said she was satisfied; I might say she did not say anything, and that she did. She took the money and signed the receipts. I think that was about all that was said. I paid the money every time to her and she receipted for it herself."

I. The only issue between the parties was as to whether there was a verbal agreement modifying the written lease, and reducing the rent to \$16 $\frac{2}{3}$ per month. The written lease provides for the payment of \$20 per month, and must control the rights of the parties, unless it was changed, subsequent to its execution by a valid parol agreement. The defendant alleges this change and upon him is the burden of proving it. To so show he must show that a subsequent verbal contract was entered into, supported by a consideration. The consideration cannot be presumed, but must be proved. Now, all that the defendant has proved is that from the date of the contract to the 1st day of June, 1880, the plaintiff voluntarily accepted \$16 $\frac{2}{3}$ per month, in full payment of the rent, and expressed herself satisfied therewith. There is no attempt to prove any consideration for the acceptance of this sum in lieu of \$20 per month. Suppose the plaintiff did, *ex mera gratia*, accept \$16 $\frac{2}{3}$ per month for a portion of the time, that fact would not bind her to accept that sum for the remainder of the term. As the defendant's evidence failed in an essential particular to establish the contract by him alleged, it follows that the court did not err in withdrawing the case from the jury and entering a judgment for the plaintiff. The first, second and fourth questions, and the second and third branches of the sixth question, must be answered in the negative. The third question, and the first branch of the sixth question, must be answered in the affirmative.

II. The tender, it appears from the evidence, was made for three months, at the rate of \$16 $\frac{2}{3}$ per month. The de-

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fendant did not, therefore, tender the plaintiff for the two months in controversy, as much as she is entitled to under the contract. The fifth question submitted must be answered in the negative.

AFFIRMED.

HULBERT V. ATHERTON.

1. Contract: WRITTEN OFFER AND ORAL ACCEPTANCE: STATUTE OF LIMITATIONS. Where a proposition is in writing, and the acceptance of it is oral, the contract is an oral contract, and an action thereon is barred after the lapse of nearly nine years. So held in this case, where defendant made a proposition by letter to the plaintiff, and the plaintiff wrote to a third party to accept it, if he could not get better terms, and the acceptance by such third party was oral.

Appeal from Dubuque District Court.

THURSDAY, JUNE 15.

THIS action was commenced February 8, 1881. The plaintiff alleges in his petition that on May 7, 1871, he, the defendant, and A. S. Davis and Marshall Kingman formed a copartnership under articles authorizing either party to withdraw at the end of six months, taking one-fourth part of the value of the stock and assets, the remaining partners being required to pay such retiring partner for his interest in the assets, after paying the debts of the firm, within three months after the retirement; that in November Kingman retired and received his share of the stock and assets; that subsequently, on November 17th, 1871, plaintiff retired, but received no portion of his share of the stock or assets; that afterward Davis retired, leaving the defendant, Atherton, the sole member, and in possession of all the stock and assets; that afterward it was agreed by defendant that there was due from him to the plaintiff, as his share and interest in the stock and assets under said articles, the sum of \$800, which

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agreement or admission by defendant was in writing, and was in writing accepted and agreed to by plaintiff; that plaintiff is unable to set out a copy of said writing as the same has been lost.

The defendant, amongst other defenses, pleaded the statute of limitations.

There was a jury trial, resulting in a verdict for plaintiff for \$800, with interest from May 1st, 1872, at ten per cent. Judgment was entered upon this verdict for \$1,552.32. The defendant appeals.

Hurd & Daniels, for appellant.

S. P. Adams, for appellee.

DAY, J.—The testimony introduced on behalf of the plaintiff tends to establish the following facts: About June, 1872, the plaintiff received a letter from the defendant in which he said that, without looking the matter over thoroughly, he had concluded to make plaintiff an offer of \$800 for his interest in the concern, and would pay him that amount.

The plaintiff thereupon wrote a letter to his brother-in-law, Mr. Amsden, of Dubuque, requesting him to see Mr. Atherton, and if he felt that that was the best plaintiff could do, to accept the offer.

Upon receipt of the letter Mr. Amsden went to Mr. Atherton, and either read the letter to him, or told him its contents, and tried to get him to admit that the plaintiff ought to have more than \$800, and then accepted his offer. The court properly instructed the jury that it must be established that Davis, as the remaining partner in the firm, agreed that plaintiff's interest on retiring should be \$800, that this agreement on the part of the defendant was in writing, and also that plaintiff accepted the defendant's offer in writing. The letter of the defendant, according to the testimony of the plaintiff, was a mere offer, not binding upon either party until accepted. The letter written by plaintiff to Amsden was in

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no sense an acceptance of defendant's offer. It was simply a constituting of Amsden as plaintiff's agent, with directions to obtain better terms if he could, and if he became satisfied that he could not, to accept the defendant's offer. Amsden does not make any claim that he accepted the defendant's offer in writing. If he accepted it at all, the evidence shows that it was a mere verbal acceptance. Where a proposition is in writing and the acceptance is verbal, the contract is an oral contract. See *Commissioners of Mason County v. Sheply*, Albany Law Journal, February 18th, 1882, and authorities cited; *Wright v. Weeks*, 25 N. Y., 153.

As the contract sued upon was in parol, and the action was not instituted until nearly nine years after the alleged acceptance of defendant's offer, it follows that the action is barred by the statute of limitations. The verdict is not sustained by the evidence, and, upon that ground, the court should have set it aside. This view of the case renders it unnecessary to consider the other errors assigned.

REVERSED.

KERSHMAN, ADM'E, v. SWHELA.

1. **Depositions: TAKEN AFTER DEATH OF PARTY: NOT EVIDENCE.** Where the plaintiff in an action gave notice of taking depositions, but died before the day named, and no one was substituted as plaintiff in his stead, but the depositions were taken, *held* that, in the same action, after plaintiff's administrator had been substituted as plaintiff, the court should have sustained defendant's motion to strike from the files or suppress the deposition, as it was binding neither on the substituted plaintiff, nor on the defendant.

Appeal from Chickasaw Circuit Court.

FRIDAY, JUNE 16.

IN February, 1880, A. Kershman, deceased, filed a petition stating that he had purchased of one Marsh certain described

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real estate upon which defendant had a mortgage; that before he paid Marsh for the land, defendant agreed he would release the same from the mortgage; that he did pay said Marsh, but defendant refused to release and had foreclosed the mortgage; that defendant was prevented from appearing in said action to foreclose the mortgage because of unavoidable casualty which was occasioned by his sickness and insanity. The relief asked was that the decree of foreclosure be set aside and for such other relief as was equitable. Defendant denied the allegations of the petition, and the court ordered the evidence to be taken in the form of depositions.

In March, 1881, a substituted petition was filed by the present plaintiff, and she was substituted as plaintiff. The defendant denied the allegations of the substituted petition. Judgment for the plaintiff, and defendant appeals.

Brown & Portman, for appellant.

No appearance for appellee.

SEEVERS, CH. J.—During the lifetime of A. Kershman a notice was served on the defendant that he would take the depositions of certain witnesses on the 20th day of July, 1880. Kershman died on the 18th day of said month. Notwithstanding this fact, the depositions were taken, the defendant declining to appear because of the death of the plaintiff in the action, and there had not been any person substituted in his stead.

At the proper time the defendant filed a motion to strike from the files or suppress the depositions, because at the time they were taken there was no plaintiff in the action, which motion was overruled and the cause afterward submitted to the court.

We think the court erred in not sustaining the motion. When A. Kershman died there was no plaintiff in the action, and depositions could not be legally taken. The rights of whoever might be substituted as plaintiff would not be bound

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by depositions thus taken. Nor would the defendant. Eliminating such evidence from the record there is no doubt the court erred in rendering judgment for the plaintiffs.

REVERSED.

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131	547

1. **Municipal Corporations: POWER TO ISSUE BONDS IN SATISFACTION OF JUDGMENT.** Where one G., had obtained judgment against the plaintiff, a municipal corporation, *held, arguendo*, that the plaintiff had power, under section 500 of the Code, to issue its bonds to G., for the amount of the judgment—that this was equivalent to issuing its bonds to borrow money to pay the judgment creditor.
2. **Practice: MUNICIPAL BONDS: VALIDITY OF NOT TRIABLE IN COLLATERAL PROCEEDING.** Where defendants had obstructed plaintiff's street, whereby G. was injured, and plaintiff sued defendant to recover the amount of a judgment which G. had procured against plaintiff on account of such injury, which judgment plaintiff had satisfied by issuing to G. its negotiable bonds for the amount of the judgment, and defendants, for an amendment to their answer, set up that the bonds constituted no satisfaction or payment of the judgment, because they were invalid for want of authority in plaintiff to issue them, *held* that the amendment was properly stricken out on plaintiff's motion, because the validity of the bonds could not thus be tried in a collateral proceeding.
3. **Municipal Corporations: VALIDITY OF BONDS ON THEIR FACE NEGOTIABLE: ISSUED IN SATISFACTION OF JUDGMENT.** Where a municipal corporation has power to bind itself by a written obligation, even if it be conceded that it has not the power to make the same negotiable, and it executes its written obligation making the same negotiable *in form*, it would not be void; it would result only that the instrument would not *in fact* be negotiable; and, in this case, where bonds were so issued in satisfaction of a judgment, *held* a sufficient payment of the judgment to support an action against the defendants, on account of whose wrong the judgment had been obtained.
4. **—: CONTRACT OF CHAIRMAN OF STREET COMMITTEE: CITY NOT BOUND BY.** A contract made by the chairman of a street committee is not the act of the committee and does not bind the city whose council appointed the committee. The general rule is that, where power is entrusted to two or more persons, without an express provision that either one alone may exercise it, it can be exercised only by the concurrent act of at least a majority.

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5. — : — : RATIFICATION BY STREET COMMISSIONER. The street commissioner, unless he had authority to bind the city by a contract made by him originally, had no power to bind the city by ratification of a contract made by the chairman of the street committee.
6. — : — : RATIFICATION BY CITY COUNCIL: PRACTICE IN SUPREME COURT. Where there was no evidence tending to show a ratification of the agreement made by the chairman of the street committee, this court will not consider an objection that the question of ratification was not properly submitted. To constitute such ratification, there should have been, at least, the expressed assent of the majority of the city council; but there appears to be no evidence of such assent.
7. — : LIABILITY OF PARTY OBSTRUCTING STREET: CONTRIBUTORY NEGLIGENCE OF CITY. Where a person places an obstruction in the street of a city, he is not in a condition to demand of the city that it shall remove the obstruction at its own expense, if it has knowledge of it, and in case of failure to remove it after such knowledge, that it shall be precluded from looking to him for indemnification, if it is adjudged to pay, and does pay, damages for an injury caused by the obstruction.

Appeal from Woodbury District Court.

FRIDAY, JUNE 16.

ACTION to recover the amount of a judgment obtained against the plaintiff city by one Green, for a personal injury caused by an obstruction of a street by dirt placed in the street by the defendants. The plaintiff avers that the defendants were notified of the action in which the judgment was obtained; that the plaintiff has paid the judgment, and that the defendants have become liable to reimburse the plaintiff for the amount thereof. The defendants deny the payment, and aver that the plaintiff entered into an agreement with the defendants whereby it undertook to remove the dirt for its own use in repairing streets, and whereby it relieved the defendants from all further care or labor in regard to the same.

There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendants appeal.

Chase & Taylor and O. C. Tredway, for appellants.

Joy & Wright and J. M. Cleland, for appellee.

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ADAMS, J.—I. The plaintiff introduced evidence showing that it issued to Green its six per cent negotiable bonds, which were received by him in payment and satisfaction of the judgment. After the introduction of such evidence, and on the second day of the trial, the defendants filed an amendment to their answer in which they averred that the bonds were issued without authority of law, and were void and constituted no payment of the judgment. They averred that, at the time of the issuance of the bonds, the plaintiff city had already issued its bonds in anticipation of its revenues in excess of five per cent of the taxable property of the city. The plaintiff moved to strike out the amendment to the answer, and the court sustained the motion, on condition, however, that the amendment might remain on file if the defendants would pay the costs of the suit to that date, and \$25.00 as terms. The defendants refused to submit to the terms, and the amendment to the answer was stricken out. The defendants assign as error the ruling upon the motion.

Whether, if the amendment had averred anything which the defendants were entitled to prove, the court would have been justified in imposing the terms which it did as a condition of allowing the amendment to remain on file, we need not determine. We do not think that the validity of the bonds could be assailed upon the ground therein alleged.

The averments contained in the amendment appear to have been made in part with reference to the constitutional restriction upon municipal indebtedness, limiting it to five per cent of the value of the taxable property. But the constitutional restriction does not appear to us to have any application. It may be greatly doubted whether the validity of the bonds could be properly assailed by reason of the constitutional restriction, even if the plaintiff's indebtedness exceeded the constitutional limitation at the time the judgment was rendered. It is very clear that if it did not, and there is no infirmity in the judgment for that reason, the

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bonds issued in payment of it are not invalid merely by reason of the constitutional restriction, and the fact that the limitation had been exceeded, as the amendment avers, at the time they were issued. Their issuance did not increase the plaintiff's indebtedness.

But the defendants rely in part upon a provision of statute. They say that municipal corporations are authorized to issue bonds only as evidence of a loan of money, and that if we are to treat the transaction as a loan of money it cannot be upheld provided the indebtedness of the city at the time exceeded five per cent of the value of the taxable property, as the amendment avers it did.

The provision of statute relied upon is section 500 of the Code and is in these words: "Loans may be negotiated by any municipal corporation in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of five per cent of the taxable property."

The transaction in question, while not strictly a loan, comes, we think, within the spirit of the provision authorizing loans.

1. **MUNICIPAL corporations:** power to issue bonds in satisfaction of judgment. The issuance of the bonds to the judgment creditor in payment of the judgment imposes upon the city the same obligation that would have been imposed if they had been issued for money borrowed to pay the judgment creditor.

So far as the transaction differs from a loan, the difference is not in substance, but in form. We are unwilling, therefore, to give the statute such a strict construction as to deprive municipal corporations of the exercise of the right in question, which it appears to us must often be a valuable one. Now, where a municipal corporation borrows money on time, or does an equivalent act, as in this case, negotiates for time in the payment of indebtedness, it may doubtless give its written obligation, and there can, we think, be no objection to the obligation being given in the form of a bond or bonds. *Rogers v. Burlington*, 3 Wallace, 654.

Possibly the statutory limitation would render the bonds

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invalid if given in excess of the limitation, and that, too, if given for the extinguishment of an antecedent municipal bonds: validity of not triable in collateral proceeding. given for the extinguishment of an antecedent and valid indebtedness; but that point we do not determine. The averment of the amendment designed to assail the validity of the bonds was that the "plaintiff had already issued its bonds in anticipation of its revenues largely in excess of five per cent," etc. It is not averred that the bonds which had been issued were still outstanding and constituting a valid obligation against the city. But if this averment had been made it appears to us that it would not have tendered an issue which the court in this action could properly have tried. It is evident that the bonds issued to Green are not invalid for the reason alleged, unless the city could, as against the holder thereof, maintain a successful defense, and a defense could be maintained only in case there were other bonds outstanding in excess of the statutory limitation against which a defense could not be maintained. To hold that the court in this action, with the parties which it had before it, could be properly called on to try such an issue, if it had been tendered, would be going a great way, and would, as it appears to us, contravene well recognized principles. *Hardin v. Branner*, 25 Iowa, 370.

II. The court in its second instruction charged the jury, in substance, that the payment made by the issuance of the bonds was a sufficient payment. Defendants say that the payment thus made was not in any view sufficient. They say the bonds were void upon their face. The bonds were made negotiable, and show upon their face that they were given for indebtedness. The defendants' argument is, as we understand it, that while it may be true that a municipal corporation has, by implication, the power within the statutory limit to issue, for money actually borrowed, bonds which are negotiable, because it is upon such bonds that money can be borrowed at the lowest rates in the money markets of the world,

2. PRACTICE: municipal bonds: validity of not triable in collateral proceeding.

3. MUNICIPAL corporation: validity of bonds on their face negotiable: issued in satisfaction of judgment.

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the corporation has not by implication the power to issue such bonds to be used directly in the payment of indebtedness, because the reason for the issuance of such bonds does not exist. They cite *Clark v. The city of Des Moines*, 19 Iowa, 199, and *Dively v. The city of Cedar Falls*, 21 Id., 565. But the doctrine of those cases does not go to the extent claimed. Where a municipal corporation has the power to bind itself by written obligation, without the power to make the same negotiable, and it executes its written obligation making the same negotiable in form, it would not be void. It would result only that the instrument would not in fact be negotiable, and would lack the characteristics with which actual negotiability would clothe it.

III. The defense upon which the defendants seem to rely with most confidence is the alleged agreement on the part of

4. ____ : contract by chairman of street committee: city not bound
the plaintiff to remove the dirt for its own use in street repairs, and the alleged release of the defendants from all further care and labor in

regard to it. There was evidence tending to show that one Hedges, chairman of the street committee, made such agreement, and that the street commissioner removed a portion of the dirt.

The court gave an instruction to the effect that an agreement made by Hedges would not bind the plaintiff unless the same was ratified by the city council. The defendants assign error upon this instruction.

We are not prepared to say that a ratification by the city council was absolutely necessary. Some of the members of the court are inclined to think that the street committee had power, in the discharge of its duties as such committee, to contract for dirt for street repairs as the need of the same might arise from day to day, and without any specific action of the council thereon. But it is not necessary to determine this question, because there is no evidence that the alleged agreement was made by the street committee, unless the action of the chairman could be held to be the action of the

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committee, and such, we think, is not the law. The general rule is that where power is entrusted to two or more persons, without an express provision that either one alone may exercise it, it can be exercised only by the concurrent action of at least a majority. *Soens v. The City of Racine*, 10 Wis., 271; *Grindly v. Barker*, 1 Bos. & Pull., 236.

IV. The defendants contend that there was evidence
5. ____ : ____ : tending to show that the agreement made by
ratification by street Hedges was ratified by the street commissioner
by street commissioner. and that the instruction was wrong, in that it
precluded the jury from finding such ratification.

While it appears that the street commissioner removed a portion of the dirt, the evidence shows that he did so only at the request of the defendants. Besides we are of the opinion that there was nothing which he could have said or done which would have had the effect to ratify Hedges' agreement unless he had the power to bind the city by a contract made by him originally, and we are unable to discover that he had such power.

V. The defendants complain that the question as to whether the agreement was ratified by the city council was
6. ____ : ____ : not properly submitted. We do not care to go
ratification by city council : into a discussion of the alleged erroneous manner
practice in su- preme court. of submission. Any error committed in this respect was without prejudice, unless there was some evidence tending to show a ratification. To constitute a ratification of the agreement there should, at least, have been the expressed assent of the majority of the council to the agreement. But we are unable to find any evidence tending to show that such assent was expressed even in the most informal manner.

The mayor, it is true, in being examined as a witness for the defendants, testified that the matter of using the dirt was talked over in the council; and in giving his testimony he used this expression: "We had concluded to use it because it was more convenient." Now if it should be conceded

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that by the word "we" he meant the city council, and intended to be understood as saying in substance that there was an expressed assent of the majority to the use of the dirt, the testimony is insufficient to show an assent to Hedge's agreement. It does not appear indeed that the city council had knowledge of the agreement, or that the agreement had in fact been made at that time. If the council had understood that the defendants were from that time relieved from all responsibility in regard to the dirt it is fair to presume that it would have been more diligent in causing the dirt to be removed, or would have caused guards to be erected and maintained at the city's expense.

VI. The defendants contend that as the city council had full knowledge of the obstruction, it was guilty of contributory negligence, and they asked an instruction upon the theory that the jury would be justified in finding against the plaintiff upon the ground of contributory negligence. The court refused the instruction, and the defendants assign error upon the refusal.

7. ~~ability for obstructing street: contributory negligence of city.~~ In our opinion the instruction was properly refused. Where a person places an obstruction in a street of a city, he is not in a condition to demand of the city that it shall remove the obstruction at its own expense, if it has knowledge of it, and in case of failure to remove it after such knowledge that it shall be precluded from looking to him for indemnification if it is adjudged to pay, and does pay damages for an injury caused by the obstruction. *Swaney v. Chace*, 16 Gray, 304; *Woburn v. R. R. Co.*, 109, Mass., 285; *Dowell v. R. R. Co.*, 23 Pick., 24.

The views above expressed cover, we think, substantially the errors assigned, and we have to say that we think that the judgment must be

AFFIRMED.

Waller v. Davis.

WALLER V. DAVIS ET AL.

1. **Partnership: DISSOLUTION: PROMISSORY NOTE: EVIDENCE.** Where an action was brought against the members of a firm on a note purporting to be executed by the firm, and for answer a general denial was pleaded, *held* that it was error to exclude evidence offered by defendant to show that, prior to the execution of the note, one of the members of the firm had conveyed his interest in the firm property to his copartners; for, while such conveyance could not be held to operate *ipso facto* a dissolution of the firm, it tended to show a dissolution, and, hence was not immaterial, especially if it should also be made to appear that plaintiff had knowledge of the fact
2. **—: WITHDRAWING OF PARTNER: NEW FIRM UNDER OLD NAME: LIABILITY FOR OLD DEBT.** Where articles of copartnership contemplated that a partner might withdraw after six months, and that the remaining partners should pay him for his interest and continue the business, *held* that the withdrawal of one partner dissolved the old partnership, and that the remaining partners constituted a new firm, and that the new firm, though acting under the same name as the old one, could not be bound by a promissory note executed by one of its members for a debt of the old firm, unless upon the dissolution of the old firm, the new one assumed and became primarily liable for the debts of the old.

Appeal from Dubuque Circuit Court.

FRIDAY, JUNE 16.

ACTION upon a promissory note purporting to be executed to the plaintiff by Atherton, Davis & Co. The plaintiff avers in his petition that the defendants, A. S. Davis, M. Kingman and J. H. Hulbert, and one Atherton, were at the time of the execution of the note copartners in business under the firm name of Atherton, Davis & Co.; and that as such partners they executed to the plaintiff the note in suit. Notice was served on Hulbert alone. For answer he pleaded a general denial. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant, Hulbert, appeals.

S. P. Adams, for appellant.

Hurd & Daniels, for appellee.

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ADAMS, J.—The undisputed facts are that the defendants and Atherton entered into a copartnership under the name of Atherton, Davis & Co., by written articles, on the 17th day of May, 1871. While the copartnership continued they became indebted to the plaintiff for the amount for which the note was given. The note was executed on the 1st day of March, 1872, by Atherton, by affixing thereto the firm name. Before that time, however, Hulbert had ceased to take an active part in the business of the firm, and he claims that he had withdrawn from the firm, and had ceased to be a member of the firm, and was not a member of any firm doing business under that name. He also claims that Kingman had withdrawn from the firm, and had ceased to be a member, and that by reason thereof, if for no other reason, the firm had become dissolved, as the plaintiff at the time of the execution of the note well knew.

I. The first question arises upon the exclusion of evidence offered by Hulbert. The evidence offered and excluded was

1. PARTNER-SHIP : dissolution:
note : evi-
dence. that Kingman, in January, 1872, sold and conveyed his interest in the firm property to his co-partners Atherton and Davis. Hulbert insists that such sale and conveyance, if made, worked a dissolution of the partnership, from which it follows that the note executed subsequently by Atherton in the firm name was not the note of the firm.

We ought, perhaps, to say in passing that it is not claimed by the appellee, and it could not be properly claimed, that where a partnership is dissolved one of the members can ordinarily bind the others by executing a note in the firm name, though given for a firm debt.

The question presented is as to whether the sale and conveyance by Kingman, if made, was a material circumstance; and if so, whether under the pleadings it was competent for Hulbert to show it.

In 1 Parsons on Con., 197, the author says: "Any assignment of a copartner's interest in the partnership funds operates

Waller v. Davis.

ipso facto a dissolution; this would certainly be true of the assignment of the whole of a copartner's interest, and perhaps of the assignment of any portion of his interest which required a closing of the partnership business and accounts to determine the value of the portion assigned." He cites Horton's Appeal, 13 Penn. St., 67; *Parkhurst v. Kinsman*, 1 Blatchford, 488; *Marquand v. N. Y. Manufacturing Co.*, 17 Johns 525; *Whitton v. Smith*, 1 Freeman Ch. (Miss.), 231.

But it is difficult to say that an assignment of a copartner's interest would in any case necessarily require a closing of the partnership business; and it appears to us that it could not be held to operate *ipso facto* a dissolution. The learned author from whose text we have quoted, seems himself to have reached the conclusion that it does not. In a note in the sixth edition of his work he says that the true principle seems to be stated in *Taft v. Buffum*, 14 Pick., 322. In that case it was held that an assignment of a copartner's interest does not operate *ipso facto* a dissolution, and is only evidence tending to show a dissolution.

If an assignment were made under such circumstances as to require a disposition of the partnership assets, and payment of the partnership debts in order to determine the value of the interest assigned, it would, we think, ordinarily, in the absence of any other evidence, be difficult to resist the conviction that the understanding was, at least on the part of the assignor, that his connection with the firm was terminated. Such assignment would ordinarily interrupt the partnership business. But we can easily suppose a case where no interruption would necessarily be caused. Suppose a member of a law firm, which owed no debts and whose assets consisted solely of property of some kind which it had taken for fees, should assign his interest in the assets, such assignment it would seem, would not of itself, cause any interruption; and if the business should be continued as before, it would not be necessary to suppose a dissolution of the old

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firm, and the formation of a new one composed of the same persons. And even in a case where the partnership assets and liabilities are extensive and complicated and involved in more or less uncertainty, so that an assignment by a copartner of his interest in the assets would require the closing up and settlement of the prior partnership business, it would be competent to show if such was the fact, that it was not the intention of the copartners to dissolve the partnership. Nor would it be necessary to suppose, if they should continue in business without such intention, that the partnership was dissolved and a new one formed.

In the case at bar the alleged assignment was made by a partner to two of his copartners, and there was evidence tending to show that the assignor continued to interest himself in the business to some extent, and did not execute any paper showing a formal dissolution until some weeks afterwards.

We do not think, therefore, that the assignment necessarily showed a dissolution. But it was not necessary that it should entitle Hulbert to introduce the evidence. If the assignment was only evidence tending to show a dissolution, it was not immaterial.

We proceed next to consider whether the pleadings were such as to justify its exclusion; and we have to say that we think that they were not. We have already shown that the allegation of the petition was, that the defendant and one Atherton were copartners, and as such executed to the plaintiff the note in suit. This the defendant Hulbert denied. It seems to us that the evidence was admissible under the issue thus made. The plaintiff proved the existence of the firm prior to the execution of the note. The presumption of its continuance was sufficient to make a *prima facie* case for the plaintiff so far as this point is concerned. But the presumption of the continuance of the firm was liable to be rebutted by evidence on the part of Hulbert of its dissolution. This he was entitled to prove by showing any fact or circum-

Waller v. Davis.

stance which had that tendency. It was not necessary for him to plead his evidence to entitle him to introduce it.

But it is said that the fact of dissolution by the retirement of Kingman, if such was the fact, could not affect the plaintiff, who had done business with the firm and was an existing creditor, unless he had knowledge of the dissolution; and it is said that Hulbert when offering the evidence of Kingman's assignment did not offer to prove also that the plaintiff had knowledge of it.

The evidence is not objected to upon that ground, and it does not appear to have been excluded upon that ground. Besides it appears that Hulbert at another time did offer to prove by the plaintiff himself that he had knowledge of the assignment.

Now, while as we have held, the sale, if made, did not necessarily show dissolution, and, as a consequence, knowledge of the sale would not strictly be knowledge of a dissolution, yet any fact tending to show dissolution must be regarded as admissible, if the plaintiff had knowledge of the fact.

II. It is insisted, however, that the sale at most would only show that Kingman retired, and while ordinarily the retirement of a partner works a dissolution it could not have <sup>2. — : with-
drawing of
partner; new
firm under
old name:
liability for
old debt.</sup> that effect in this case, because the articles of co-partnership contemplated the possible retirement of one or more partners without a dissolution. It was provided in the articles that a partner might withdraw at the end of six months, and that the remaining partner should pay him for his interest.

It is not to be denied, we think, that the articles contemplated a continuance of the business, and that too by a partnership composed of the persons who should not withdraw. But it appears to us that such partnership could not properly be considered as identical with the partnership theretofore existing. If there was a partnership after Kingman's withdrawal it was not constituted as was the partnership theretofore existing.

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Whether if the remaining partners continued in business as a new partnership under the old name, a member thereof could bind the firm by a promissory note given for an old debt, would probably depend upon circumstances. If Kingman had withdrawn at the end of six months, and had transferred to the remaining partners his interest, and they had settled with him for the same upon the basis of its value, estimated by deducting from the estimated value of the assets the liabilities of the firm, there would be much ground for contending that as between Kingman and the remaining partners the latter assumed the liabilities and became primarily liable; and that if a new firm was formed by such partners either one of them could bind the firm by giving a promissory note for the liabilities, or any one of them. But in the absence of such assumption of primary liability it seems to have been held that the authority to give a firm note does not exist. *Spaunhoist v. Link*, 46 Mo., 197.

The evidence offered for the purpose of showing Kingman's withdrawal was not such as to show an assumption of primary liability by the remaining partners. The evidence, therefore, was not properly excluded upon the ground that if admitted the result could not properly be different.

Some other questions are presented, but under the views which we have expressed it does not seem probable that they will arise upon another trial.

In excluding the evidence in question we think that the court erred, and the judgment must be

REVERSED.

District Township of Honey Creek v. Floete.

DISTRICT TOWNSHIP OF HONEY CREEK v. FLOETE, COUNTY TREASURER.

1. **District Township: TERRITORY IN OTHER TOWNSHIP: RIGHT TO TAXES ARISING FROM.** Where one of the subdistricts of a district township embraced territory in another township and county, and taxes for the contingent and teachers' fund had been levied upon such territory and paid into the treasury of the county in which it lay, and the treasurer of such county also held certain money apportioned to said territory out of the temporary school fund of said county, *held* that the money thus in the hands of the treasurer belonged to the district township to which the territory was attached, and for the support of whose school the taxes were levied and paid and the money apportioned, and that the treasurer, refusing to pay said money to said district township upon the proper warrants therefor, could be compelled by *mandamus* to do so.
2. ——: RESTORATION OF ATTACHED TERRITORY: TAXES EFFECT WHEN: APPORTIONMENT OF FUNDS. Where there has been an agreement for the restoration to a district township of detached territory, in the absence of a stipulation to the contrary, it will be held to take effect, under section 1796 of the Code, or, if that does not apply, according to the general scope and intent of the school law, on the first Monday of March after the agreement has been entered into; and the taxes collected and moneys appropriated for the support of the school of the detached territory up to the time of the taking effect of the restoration, are payable to the district township which supported the school, notwithstanding the warrants therefor are not presented and payment demanded until after the restoration has been perfected.

Appeal from Clayton Circuit Court.

FRIDAY, JUNE 16.

ACTION OF MANDAMUS. The plaintiff is situate in Delaware county and the defendant is treasurer of Clayton county. The petition states that for twenty years preceding 1880 one of the subdistricts of plaintiff embraced certain territory in Lodomillo township, Clayton county, and that the school in said subdistrict was under the control of plaintiff; that in September, 1879, by the action of the respective boards of directors of plaintiff, and the district township of Lodomillo, said territory was restored to the latter; that in 1877, 1878,

District Township of Honey Creek v. Fleete.

and 1879, certain taxes were levied on said territory for contingent and teachers' fund which has been collected and are in the hands of defendant; that an order was drawn prior to the commencement of this action, signed by the president and secretary of plaintiff, directed to the defendant, requiring him to pay the money so in his hands to plaintiff's treasurer, and that defendant upon demand being made therefor refused to pay said money; that in September, 1878, and 1879, and on the first Monday in April, 1880, there was apportioned to said plaintiff for said subdistrict on the basis of enumeration of scholars in the territory of said subdistrict, in said Lodomillo township, of the temporary school fund of Clayton county, by its auditor, certain other moneys which are in the hands of the defendant; that immediately after said apportionments said auditor notified plaintiff thereof, and accompanied the same with warrants for the money aforesaid, which were duly signed by the president and secretary of the plaintiff and payment thereof demanded of defendant, which was refused. The plaintiff claims the payment of said warrants was an official duty which can be enforced by *mandamus*.

The defendant admitted the money was in his hands and that he had refused to pay the same to the plaintiff. There was a trial to the court on agreed statement of facts, judgment for the plaintiff, and defendant appeals.

S. K. Adams and Murdock & Larkin, for appellant.

A. S. Blair, for appellee.

SEEVERS, Ch. J.—The defendant pleaded "that he denies said territory of Lodomillo township belongs, or has belonged,

1. DISTRICT
township :
territory in
other town-
ship: right
to taxes
arising from to said plaintiff since on or about the year 1873, when said territory under and by virtue of chapter 9 title 12 of the Code of 1873 became a part of the school district of Lodomillo township, and ceased to be a part of the plaintiff, never having been attached

District Township of Honey Creek v. Floete.

to or set over to the plaintiff by the school superintendent of Clayton county, Iowa, on account of streams or other natural obstacles, or for any other cause whatever."

A demurrer to this portion of the answer was sustained, and it is insisted this was error. Counsel for appellant rely largely on *Large v. The District Township of Washington*, 53 Iowa, 663. In that case it was held that since the Code took effect subdistricts must be co-terminous with the township, except as provided in Code, § 1797, and that territory geographically situate in one township could not be taxed for the erection of a school-house in another township, unless it had been attached thereto in the manner, and for the purposes contemplated in the section referred to.

In the case cited it was the tax payer who complained of the illegal taxation. In the case at bar the tax payer has paid the taxes levied, and the money is in the defendant's hands and should be paid by him to the plaintiff or the district township of Lodomillo. As we understand, the defendant claims it is not his duty to pay the money to the plaintiff, because it belongs to the district township of Lodomillo. The plaintiff claims it is entitled to the money because the territory was in fact attached to it for school purposes, so treated, and the taxes levied and collected for such purposes. The presumption must be indulged, in the absence of any showing to the contrary, that children residing on said territory attended school in the district to which it in fact was attached. Now it may be a tax payer residing on said territory could not have been compelled to pay taxes levied for the erection of a school-house in the geographical limits of Honey creek township. But this does not settle the question at issue between these parties. Whether there is a material distinction between taxes levied for the erection of a shool-house, and other taxes levied for school purposes, we shall not stop to inquire. The material question to be determined is, to whom does the money belong. We think to the plaintiff, because the taxes were levied for the support of the school. The amount necessary

District Township of Honey Creek v. Floete.

for this purpose must, under the statute, have been determined by the plaintiff, by whom the school which the taxes were levied to support, or for whose benefit the same were apportioned, was in fact furnished and the expenses thereof paid.

II. It appears from the agreed statement of facts that the board of directors of the plaintiff and the district township

2. ____ : restoration of detached territory : takes effect when: apportionment of funds. of Lodomillo concurred in and restored the territory in question to the latter in September, 1879, but no time was fixed when such restoration should take effect. There is some doubt whether section 1796 of the Code applies to a case of this character. If it does then the restoration did not take effect until March, 1880. If it does not apply, then there is no positive statutory declaration on the subject.

Conceding there is not, we think according to the scope and intent of the school law, when there is no agreement to the contrary, the restoration should not be regarded as taking effect until the first Monday in March after the agreement had been entered into. Such time is the beginning of the school year. Taxes are then voted by the district and arrangements then made for the school.

The Circuit Court held the plaintiff was entitled to all the money claimed except that apportioned April 1st, 1880. The taxes had been levied, collected and apportioned before the restoration took effect except as just stated.

It does not clearly appear when the warrants were drawn and presented for payment. It is assumed, however, by counsel for appellant this was not done until after March, 1880. It is said it was not the duty of the defendant to pay the warrants at that time, because there was not then any territory in Clayton county attached to the plaintiff, and section 1785 of the Code is relied on.

But we think it was the duty of the defendant to pay the money to the plaintiff because it belonged to it, and the time of the demand made for it was not material unless because of the lapse of time the statute of limitations had become oper-

Stevens v. Cassady.

ative, or there was something else to bar the right, other than the slight delay in making the demand that occurred in this case.

AFFIRMED.

STEVENS v. CASSADY.

1. **Tax Sale: REDEMPTION BY MINOR.** Real estate sold for taxes under section 779 of the Revision must be redeemed before the expiration of three years from the date of the sale, that is, the time when the property is struck off to the bidder; and if the property belonged to an adult at that time, the time of redemption cannot, under the provision of said section, be extended in favor of a minor who should acquire title to the property, either by conveyance or descent, before the expiration of the three years.

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86 515

Appeal from Pottawattamie Circuit Court.

FRIDAY, JUNE 16.

ACTION in equity by a minor to redeem real estate sold for non-payment of taxes. Judgment for plaintiff and defendant appeals.

Dailey & Burke, for appellant.

Sapp & Lyman, for appellee.

SEEVERS, Ch. J.—This cause is submitted on the following agreed statement of facts:

“John F. Stevens, the father of Ira G. Stevens, the plaintiff, was, up to the time of his death, the fee owner of lots 18, 19 and 20 in block 4, and lots 13 and 14 in block 9, Pierce’s addition to Council Bluffs, Iowa.

“In the month of January, 1861, said lots were all sold by the county treasurer at a valid tax sale for the non-payment of taxes, which sale is regular and its validity unquestioned.

“In June, 1863, John F. Stevens died, leaving surviving

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him a widow and six children, of which Ira G. Stevens was one, and by virtue of which he claims the right to redeem a ninth interest in the property.

"The tax sale was made and certificate issued January, 1861, and after the death of John F. Stevens a tax deed was made, and defendant holds title under said tax deed.

"Ira G. Stevens was at the institution of the suit a minor.

"The only question between the parties is one of law, to-wit:

"Under the facts stated has Ira G. Stevens a right to redeem a ninth interest in said property?"

The statute in force at the time of the sale and under which appellee claims the right to redeem is section 779 of the Revision. It is as follows: "Real property sold under the provisions of this act may be redeemed at any time before the expiration of three years from the date of the sale * * * * provided that if real property of any minor, married woman or lunatic be sold for taxes, the same may be redeemed at any time within one year after such disability be removed * * * * "

The general rule under this section is that all real estate sold for non-payment of taxes must be redeemed before the expiration of three years after the sale. To this rule there are three exceptions. Where the property sold belongs to a minor, married woman or lunatic. As to the meaning of the word sale in the first part of the section above quoted there can be no doubt. It means the time when the property is struck off to the bidder. From that time the period within which redemption must be made begins to run. Now has the same word in the proviso of the same section a different meaning? The appellee insists that it has, and that it means completed sale, and that is when the treasurer's deed has been recorded, as was held in *Eldridge v. Kuehl*, 27 Iowa, 160, under section 790 of the Revision. The reasons for this construction are stated in the case cited, and it is sufficient to say they do not apply to the case at bar. Indeed

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Cole, J., the writer of the opinion, concedes the construction placed on the word sale is an exception to the general rule of the statutes relating to tax sales. In the case at bar, in order to sustain the ruling of the Circuit Court, we are required to place a different meaning on the same word in the same section of the statute when neither the context nor subject matter justifies it.

The priviso above quoted provides in terms for the redemption of the property of a minor, sold for taxes. That is, the property when sold belongs to a minor. It has no reference to the property owned by the ancestor of the minor when sold. Provision as to the redemption of such property is made in the first part of the section. The result of the holding of the Circuit Court would be, where the property of an adult is sold for taxes, who should find it inconvenient to redeem within three years from the sale, he could, six months or less before the expiration of such period, convey to his minor child and thus extend the period for redemption until one year after such child attained his majority. There cannot be any distinction as to the time when redemption must be made between a minor who is vested with the title by a conveyance and where such title is vested by descent. There is dictum in *Burton v. Hintrager*, 18 Iowa, 348, which accords with the view above expressed.

REVERSED.

Renwick v. Bancroft.

RENWICK V. BANCROFT ET AL.

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123 58
1. **Specific Performance: DELAY IN COMPLYING WITH DECREE.** In a suit for the specific performance of a contract to convey land, where the decree was that the plaintiff should have a deed upon making a cash payment and executing certain notes and a mortgage on the land to secure deferred payments, but no time was fixed when the plaintiff should perform on his part, *held* that his neglecting to do so for nine months would not bar his right to an enforcement of the decree. If the defendants desired an earlier performance, they should have tendered their deed and demanded the money and securities.
 2. **— : — : INTEREST DURING DELAY.** In this case the decree was that plaintiff should pay upon a tender of the deed, and it was *held* that defendants could not demand interest from the date of the contract, but only from the date of their tender of the deed.
 3. **— : SUFFICIENT TO COMPLY WITH DECREE.** Nor could defendants object to receiving the notes tendered, on the ground that they were not made payable to the proper parties, since they were at least made in accordance with the decree.
 4. **— : DECREE: FORM OF MORTGAGE MADE PURSUANT TO.** Neither can defendants be heard in this court to object to the mortgage tendered by plaintiff on the ground that it is executed by him alone, without showing that he was unmarried, or that it was given for purchase-money, since there is nothing in the record showing that plaintiff was married. This court can not presume that he was married.
 5. **Practice in Supreme Court: ARGUMENT NOT FILED IN TIME.** It is not the practice to strike from the files an argument not filed in time; but in such a case, when the court is asked (and not otherwise) the costs of such argument will be taxed to the party filing it, unless the delay in filing has been reasonably excused.

Appeal from Howard Circuit Court.

FRIDAY, JUNE 16.

THE original action was in equity for specific performance. There was a decree for the plaintiff, which upon appeal was modified and affirmed by the Supreme Court. This appeal is by the defendants and is from certain alleged erroneous rulings made by the Circuit Court subsequent to the modification and affirmance by the Supreme Court.

Renwick v. Bancroft.

Geo. E. Marsh and Cyrus Foreman, for appellants.

Barker & Bros. and H. T. Reed, for appellee.

SEEVERS, CH. J.—Upon the former appeal this court held the decree should be modified as follows: “The plaintiff should be required to pay the \$200 cash payment before conveyance and the deferred payments should be secured by mortgage on the land. And as the defendants obtain by this modification a more favorable decree than that appealed from, appellee will be taxed with the costs of the appeal.” *Renwick v. Bancroft*, 56 Iowa, 525. The decree of the Circuit Court, except as modified, was affirmed. This was a final desposition of the case and settled the rights of the parties. Whether the defendants could plead matters occurring subsequent to the filing of the opinion of this court, which would make it inequitable to enforce it or estop the plaintiff claiming thereunder, we have no occasion to determine. *Adams County v. B. & M. R. R. Co.*, 44 Iowa, 335.

By the terms of the decree the clerk was appointed a commissioner to execute the conveyance to the plaintiff, and the latter on the 17th day of December, 1881, deposited with said clerk the cash payment, the notes and mortgage, in compliance as he claimed with the decree as modified, and demanded a deed, which the clerk refused to execute.

On January 23d, 1882, the defendants filed a supplemental answer and cross-bill and a few days thereafter an amendment thereto was filed. With the exceptions hereafter stated these pleadings were on motion of the plaintiff struck from the files. Was this prejudicial error, is one of the questions to be determined.

We do not deem it necessary to set out the statements contained in the pleadings struck out, because “they consisted merely of a history” of the case and were therefore immaterial, or set up matters which had occurred prior to the filing of the opinion of this court. As to all which such opinion must be regarded as a finality in this proceeding. The 12th, 13th,

Renwick v. Bancroft.

14th and 15th paragraphs of the supplemental answer were not stricken out. The two first were immaterial, that is to say, no relief could be founded thereon, and the two last set up the laches of the plaintiff in failing to comply with the decree as a bar to its enforcement.

No time was fixed when plaintiff should make the tender contemplated in the opinion of this court. Hence, it is 1. ~~SPECIFIC~~ argued a reasonable time was meant. Conceding performance: delay in complying with decree. this to be true, there are heavy doubts whether a delay of about nine months, in the absence of any showing of prejudice, should operate to bar the plaintiff of all rights under the decree. If the defendants felt the delay oppressive they should have tendered a deed and demanded a performance. In the absence of their so doing the objection now made is without merit.

Afterward, the clerk accepted the cash paid him and the notes and mortgages, and executed the conveyance. Upon its presentation to the court for approval the defendants made objections thereto, some of which were identical with those heretofore determined, and certain other objections. The latter only will be considered.

The first is that the tender of \$200 was insufficient, because the plaintiff was entitled to interest from the date of the conveyance: tract, or if not, from at least for some time prior interest during delay. to the tender. As we understand, this question was settled by the decree which required the plaintiff to pay upon a tender of the conveyance. This was not materially modified by the opinion of this court under which the plaintiff was entitled to a conveyance. The defendants probably would have been entitled to interest from the time they tendered a conveyance.

The second objection is that the notes were not payable to the proper parties. They, however, were made payable to the defendants in the action, or at least in accordance with the decree. It is said one of the payees in the notes is not mentioned in the mortgage. But 3. ~~sum-~~ client to comply with decree.

Renwick v. Bancroft.

this objection was not made below and cannot be for the first time in this court.

The third objection is that the mortgage is executed by the plaintiff, and it is not stated he is unmarried or that the <sup>4. — : de-
cree: form of
mortgage
made pur-
suant to.</sup> mortgage was given to secure the purchase-money. We do not find that any evidence was offered in support of this objection, or that it appeared of record that plaintiff was married. The court could not presume he was. Besides, the mortgage was good between the parties. Other objections were made to the deed of a technical character which we do not deem it necessary to specifically notice, otherwise than has been heretofore indicated.

A motion was made to strike appellee's argument because not filed in time. Such is not the practice, but when asked <sup>5. PRACTICE
in supreme
court: argu-
ment not filed
in time.</sup> we will tax the costs of such argument to the party filing it, unless the failure to file within the time prescribed by the rules of the court has been reasonably excused. We have some doubts whether this has been done, but as appellant does not ask the costs of the argument taxed to the appellee the motion will be overruled.

AFFIRMED.

Munson, Adm'r, v. Plummer.

MUNSON, ADM'R, V. PLUMMER ET AL.

1. Forceable Detainer: Tenancy at Will: Facts Constituting.

Where real property was ordered sold under special execution, and the execution defendants had appealed the cause to the Supreme Court, but the execution plaintiff, who purchased the property at the sale, did not demand a sheriff's deed, as he might have done under section 3102 of the Code, but accepted a certificate of purchase subject to redemption, and allowed the defendants to occupy the property, held that defendants were in possession with the assent of the owners, and were tenants at will, and that the action of forcible entry and detainer could not be maintained against them without the thirty days notice required by section 2015 of the Code.

Appeal from Buchanan Circuit Court.

FRIDAY, JUNE 16.

Action of forceable detainer. There was a trial of the case before a justice of the peace, and judgment for the plaintiff. Upon appeal to the Circuit Court the judgment of the justice was affirmed. Defendants appeal.

John J. Ney, for appellants.

C. E. Ransier, for appellee.

ROTHROCK, J.—I. The case was tried in the Circuit Court upon the following statement of facts as agreed upon by the parties, and which is embraced in the certificate of the judge:

“1st. The parties agree to the following statement of facts:

“On the 7th day of November, 1879, a judgment was entered in the Circuit Court of Buchanan county, Iowa, in favor of plaintiff and against defendants, and the amount of the judgment was \$1,810.30 and cost. The decree stated that lot 8, block 5, S. & M's addition to Independence, Iowa, be sold to satisfy the same.

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"On the 12th day of November, 1879, a special execution was issued out of said court directing the sheriff to sell said property subject to redemption. An appeal was taken from said judgment and decree to the Supreme Court of Iowa, prior to the day of such sale.

"That on the 13th day of December, 1879, said premises were sold on said execution to plaintiff, the purchaser, and a certificate of sale issued, which stated that said premises were sold subject to one year's redemption.

"On the 14th day of December, 1880, said plaintiff obtained a sheriff's deed by virtue of such sale. Defendants have held possession of said premises since 1872, with plaintiff's knowledge, to the time of the trial of the case before the justice from which this appeal was taken, to-wit: December 24th, 1880. And no notice to quit was served on defendants, except the three days notice. On the 27th day of December, 1881, the justice rendered judgment in favor of the plaintiff, granting the writ of removal and judgment for costs and soforth.

"2d. This court asks the opinion of the Supreme Court as to whether or not, under the above statement of facts, a three days' notice is sufficient to sustain the action of forcible entry and detainer, or are defendants entitled to thirty days notice?

"Are defendants tenants at will?"

The point of controversy seems to be whether the defendants were tenants at will, and it seems to be conceded that if they were, the tenancy could not be terminated without the thirty days notice required by section 2015 of the Code.

It appears that the appeal was taken after the special execution was issued, and that, notwithstanding the appeal, the plaintiff, without recalling the execution, or even demanding that the sale be made absolute, allowed it to proceed and without demanding a deed, took his certificate of sale and allowed the defendants to remain in possession during the period provided by law for redemption.

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The right of the defendant to redeem was forfeited by the appeal. Code, § 3102.

The facts in this case appear to us to be within the rule announced in *Dobbins v. Lusch, Carton & Co.*, 53 Iowa, 304. In that case the plaintiff in execution elected to leave the property in its original possession pending the appeal, and it was held that the possessor became a tenant at will because he was in possession with the assent of the owner. The facts in the case showing the assent of the owner to the possession are stronger than they were in that case, for here the plaintiff made no demand of a deed at the sheriff's sale, but accepted the certificate, while in that case the plaintiff demanded a deed, which was refused.

II. It is argued by the appellee that the record as above set out does not show which party appealed from the judgment and decree. It is true it is not stated in terms that the defendants appealed, but one party or the other did appeal, and we think it sufficiently appears that the defendants were appellants, as the plaintiff, by his execution and sheriff's sale, was seeking to enforce the judgment and not reverse it.

We think that the court erred in holding, under the facts in the case, that the defendants were not tenants at will.

REVERSED.

Kennedy v. Delaware County.

KENNEDY v. DELAWARE COUNTY.

1. **Witnesses: FEES OF IN CRIMINAL CASES: BY WHOM PAID.** Section 3818 of Miller's Code (chapter 207, Laws of 1880), provides that witnesses for the defense shall not in any criminal case be subpoenaed at the expense of the county, except upon order of the court or judge before whom the case is pending. This section applied to cases in all the courts of the State, including courts held by justices of the peace; and being a later expression of the legislative power than section 3814 of the Code, it must be construed as limiting the payment provided by the latter section to such of the defendant's witnesses as are subpoenaed after the proper order has been made.

Appeal from Delaware Circuit Court.

FRIDAY, JUNE 16.

ACTION brought against Delaware county to recover certain witness fees, to which plaintiff claims he is entitled, for attendance as a witness in a criminal case before a justice of the peace. The action was commenced before a justice of the peace where a judgment was rendered for the plaintiff, and upon a writ of error the judgment of the justice was affirmed by the Circuit Court. Defendant appeals.

Charles Husted, for appellant.

C. B. Kennedy, for appellee.

ROTHROCK, J.—The controversy involves the sum of two dollars, and the appeal comes to us by a certificate of the trial judge, which states the question of law to be determined as follows:

"1st. In a criminal proceeding, before a justice of the peace, wherein the defendant is adjudged not guilty, is a county liable for the fees of the defendant's witnesses upon the certificate of the justice, provided for in section 3814 of the Code of 1873, where said witnesses were subpoenaed without the order provided for in chapter 207, of laws of Iowa, 18th

Kennedy v. Delaware County.

General Assembly, and no order for the payment of said witnesses was made as provided in said chapter 207, other than by the bill and certificate set out in the petition?"

The bill and certificate set out in the petition do not show that an order was made by the justice of the peace before the witness was subpoenaed. They merely show that after the witness had attended in obedience to a subpoena, he made out a bill for his services and verified it by affidavit, and the justice of the peace appended a certificate to the effect that the claim was true and correct. It will be understood that we determine nothing but the legal question certified, and we look no further into the record than is necessary to make the question intelligible. It should be intelligible without this. Section 3818 of Miller's Code is as follows:

"Sec. 3818. In no criminal case shall witnesses for the defense be subpoenaed at the expense of the county, except upon order of the court or judge before whom the case is pending; then only upon a satisfactory showing that the witnesses are material and necessary for the defense, and the board of supervisors shall in no case audit or allow any claims for witness fees for the defendant in criminal cases, except upon order or judgment of the judge thereof. And such order may be made at the time of the trial or other disposition of the case, and upon such showing as the court may require."

This section was enacted by the Eighteenth General Assembly. It plainly provides that witnesses for the defense shall not in any criminal case be subpoenaed at the expense of the county, except upon the order of the court or judge before whom the case is pending. This section applies to cases in all the courts of the State, including courts held by justices of the peace. It is necessary that an order be made by the court or judge. An order is "a direction of a court or judge made or entered in writing, and not included in a judgment." Code, § 2922. Appellee contends, however, that the plaintiff is entitled to his fees under section 3814, of the Code. That section requires the county to pay witness fees in criminal

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cases before a justice of the peace, when the defendant is adjudged not guilty. But section 3818, being the last expression of the legislative power, must be construed as limiting section 3814 to such of the defendant's witnesses as are subpoenaed after the proper order has been made.

REVERSED.

STATE OF IOWA EX REL. AUDITOR v. IOWA MUTUAL AID
ASSOCIATION.

59	125
95	153
59	125
96	135
59	125
115	490

1. **Life Insurance: MUTUAL AID ASSOCIATION: HOW FAR SUBJECT TO STATUTORY CONTROL.** A mutual aid association, organized under section 1160 of Code, for the insurance of its own members from loss by death, sickness or accident (and the defendant is held to be such an association), need not comply with the provisions and requirements of chapter 5, title 9, of the Code, relating to life insurance companies properly so called. In order to give force and effect to section 1160, the word "every" in section 1161 must be limited to the stock and mutual companies referred to in the sections which follow.
2. _____: _____: LIABILITY FOR ANNUAL REPORT. The defendant association was not organized until April, 1881, and was not required to make an annual statement until January 1, 1882; *held* that an action begun in August, 1881, to wind up the business of the defendant, could not be sustained, on the ground that it had failed to comply with the law in regard to making an annual report.

Appeal from Wapello District Court.

FRIDAY, JUNE 16.

On the 17th day of August, 1881, the plaintiff *ex rel.* W. V. Lucas, auditor of State, filed a petition in the Wapello Circuit Court in substance alleging: That the Iowa Mutual Aid Association claims to be a corporation organized and existing for the purpose of affording financial aid and benefit to the families of deceased members, and assistance to members personally, in case of sickness or disability, with its principal place of business at the city of Ottumwa, Wapello county,

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Iowa; that on the 4th day of April, 1881, W. B. Bonifield, George W. Tool, J. E. Fence, George Haw, J. Williamson and Messrs. Moore & Hammond, signed and acknowledged before a notary public of said county a certain certificate, which said persons called "Articles of Incorporation of the Iowa Mutual Aid Association of Ottumwa, Iowa;" that said certificate so signed and acknowledged was filed with the recorder of Wapello county, Iowa, April 7, 1881, and recorded, but has not been elsewhere filed with any officer of the State of Iowa; that said association adopted by-laws; that the defendant is an association composed of the persons aforesaid as officers, and E. H. Stiles, Frank Durgan, A. P. Peterson, W. E. Chambers, R. A. Wilson, M. DeCaskey, S. M. Robinson and Christopher How as directors, and exists only under section 1091 of the Code of 1873, which provides only for the organization of incorporations other than for pecuniary profit, and only for the purpose set forth in said section; that the defendant has at no time had any capital stock subscribed, in the sum of \$100,000, or any other sum; nor has it at any time had \$25,000, or any other sum of stock paid up; or any sum in any way invested in stock, bonds or mortgages of any kind; that it has deposited with the Auditor of the State no securities at any time; that before issuing policies the said defendant did not have, and has not now, and at no time has had, applications on two hundred and fifty lives for an average of one thousand dollars each, but wholly disregarding section 1163 of the Code of 1873, immediately upon filing said certificate with said recorder, commenced to issue policies or certificates of membership, without any observance of section 1163 of the Code; that defendant is now, and at all times since its organization has been, acting entirely independent of any of the laws, regulations and provisions of chapter 5, title 9 of the Code of 1873; that said company, its officers and servants refuse to recognize the Auditor of the State as having any control or supervision over it, or any of its business or interests; that said company and its officers fail and

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refuse to make any reports to said auditor of its business and management; that neither it nor any of its officers or agents has any certificate of any kind from the Auditor of State, and that in each and every particular it has failed and refused to comply with any of the provisions of said chapter 5, title 9 of the Code. That some of the officers of defendant receive large salaries for their time and services; that the defendant has issued a large number of policies of insurance, by it called certificates of membership, on the lives of the people of the State; that said contracts of life insurance were not given by said persons organizing defendant, only, but by said persons together with a large number of other persons in no way associated together by business or other ties, and entire strangers to said association, who, since said organization, have been induced to enter into said contracts; and defendant threatens to continue to issue said certificates to all persons of the State, both male and female, the only conditions being that applicant pass an examination as to soundness of health, of mind and body, and pay the required fees and dues; that defendant insists upon the right to so continue business, and will do so unless restrained; that the auditor of State examined into the condition of defendant, and, finding it unsatisfactory by reason of absence of funds, securities, etc., he requested defendant to comply with the insurance laws of Iowa, as set forth in said chapter 5, title 9 of the Code, and that defendant fails and refuses to comply with said request.

The plaintiff prays for an injunction restraining the defendant from doing an insurance business, and that the affairs and business of the defendant be wound up. The petition sets out the articles of incorporation of the defendant, its by-laws, application for membership and certificate of membership. From the articles of incorporation it appears that the defendant is organized under the provisions of title 9, chapter 2 of the Code. Article four says: The object of this association is one of charity, benevolence and mutual aid among its members, and is intended to render assistance to its members, their

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families and their friends, by the collection and disbursement of fees and assessments, less the cost of maintaining the association. Article two, section 1, of the by-laws says: The business and objects of this association shall be to afford financial aid and benefit to the families and beneficiaries of deceased members, and assistance to the members personally in case of sickness or disability. Article four, provides for the election of a board of directors and the appointment of a general agent. Article six provides: The expense of procuring business must be met from the admission fees and annual dues. Any portion of such fees and dues not used in procuring business may be placed to the credit of the surplus fund. Article seven provides that applications for membership shall be upon printed blanks, accompanied by a fee of \$10, for certificate of membership, and \$5 additional as annual dues. It also provides for a local medical examination for which a fee of one dollar is to be paid by the association out of the admission fee, if the application is accepted; but if the application is rejected at the home office, the applicant is to pay for the local medical examination. Article eight provides that the members may be divided into two or more divisions, limited to \$2,000 benefit in case of death, and \$6 weekly benefits in case of total disability from sickness or accident, for a term not exceeding twelve weeks in any one year. It also provides that each division shall be divided into five classes, according to age. Article nine provides that upon proof of the death of a member the directors shall pay to his heirs or legal representatives the net result of an assessment, not to exceed \$2,000 in any one division.

Article ten provides that upon receipt of proofs of death of a member, each member of the division to which the deceased member belonged shall be assessed and shall pay to the secretary of the association a sum according to the class of which he is a member at the time, as follows:

Members of the first class \$.75; of the second class \$1.00; of the third class \$1.50; of the fourth class \$2.00, of the fifth

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class \$3.00. Article eleven provides for the payment of weekly benefits to members, for a term not exceeding twelve weeks in one year, upon proper certificate of their total disability from sickness or accident.

Article twelve provides that when necessary the directors shall cause an assessment to be made to provide for the payment of weekly benefits in the same manner and sums as for death benefits.

Article fifteen provides as follows: "A permanent fund may be raised in the following manner: *First*, from admission fees and annual dues. *Second*, from that portion of assessments not used for the payment of benefits, which sum shall be securely invested by the board of directors, and shall be for the following purposes: To pay benefits without an assessment, in which case the secretary shall notify all members; for printing, and all the necessary expense of management." Article nineteen provides that upon proof of the death of a member, notice shall be mailed to each member of the assessment due, and a failure of a member to pay within thirty days after such notice, forfeits his policy.

The application for membership is substantially the same as is used by stock life insurance companies. The certificate of membership is similar to an ordinary life insurance policy.

The defendant demurred to the petition upon the following grounds:

1. Because the allegations of the petition show that defendant was duly and legally incorporated under and by virtue of the provisions of the Code of 1873, particularly under section 1091, and other sections in regard to corporations other than pecuniary profit.

2. Because the allegations of the petition show that defendant is a mutual aid association, duly organized under the laws of Iowa, and that the so-called contracts of insurance in the plaintiff's petition mentioned, are the mutual obligations of the members of the association for the mutual benefit of such member.

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3. Because the allegations of the petition show that defendant is not such an insurance company as is contemplated by sections 1161, 1162 and 1163 of the Code of 1873, and that the provisions of chapter 5, of title 9, of the Code of 1873, do not apply to defendant." The court sustained this demurrer. The plaintiff appeals.

Smith McPherson, Attorney-general, for the appellant..

Moore & Hammond and Wright, Cummins & Wright,
for the appellee.

DAY, J.—I. The defendant claims to be incorporated under the provisions of title 9, chapter 2 of the Code of 1873, sections 1091 to 1102 respecting corporations other than for pecuniary profit. Corporations for pecuniary profit must cause their articles of incorporation to be recorded in the office of the recorder of deeds of the county where the principal place of business is to be, and within three months thereafter must cause their articles to be recorded in the office of the Secretary of State, and must publish for four weeks in some newspaper convenient to the principal place of business, a notice stating the name of the corporation, the nature of the business to be transacted, the amount of capital stock authorized, etc. Code, §§ 1060, 1062 and 1064.

Corporations other than for pecuniary profit are required to record their articles of incorporation only in the office of the recorder of deeds of the county where the principal place of business is kept, and a newspaper publication is not requisite. Code, § 1092.

The petition alleged that a certificate signed by the incorporators was filed with the recorder of Wapello county, Iowa, and recorded, but that the same has at no time been elsewhere filed with any officer of the State. Still, we do not understand that this action is brought to test the corporate capacity of the defendant. Chapter 6, title 20 of the Code, provides the manner in which actions shall be brought to

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test corporate rights. See, also, section 1074. This action is brought upon relation of the auditor, not to test the corporate capacity of the defendant, but to close its business for an alleged failure to comply with the provisions of chapter 5, title 9 of the Code. For the purposes of this case it must be assumed that the defendant is legally organized as a corporation. We do not deem it necessary or proper to enter upon any consideration of the legality of the defendant's organization.

II. It is claimed by the plaintiff that defendant is a life insurance company within the meaning of chapter 5, title 9 of the Code, and that it must comply with the provisions of section 1163 of that chapter. Whether the defendant comes under the provisions of that section, is the pivotal question in this case.

Section 1161 of chapter 5, provides: "Every company formed for the purpose of insuring the lives of individuals, whether organized under the laws of the State, or of any other State or foreign country, shall, before issuing any policies on lives within this State, comply with the conditions and restrictions of this chapter."

Section 1162 provides that all the stock companies organized under the laws of this State shall have not less than one hundred thousand dollars of capital stock subscribed, twenty-five per cent of which shall be paid up and invested * * and deposited with the auditor of State when he shall issue to the company a certificate, etc.

Section 1163 provides that companies organized in this State, upon the mutual plan, shall, before issuing policies, have actual applications on at least two hundred and fifty individual lives for an average amount of one thousand dollars each, a list of which shall be filed with the auditor of State, and a deposit made with said auditor of an amount equal to three-fifths of the whole annual premiums on said applications, etc., when the auditor shall issue a certificate.

Section 1160, which is found in chapter 4 of this title of

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the Code, is as follows: "Nothing in this chapter shall be so construed as to prevent any number of persons from making mutual pledges and giving valid obligations to each other for their own insurance from loss by fire or death, but such association of persons shall in no case insure any property not owned by one of their own number, and no life except that of their own members, nor shall the provisions of this chapter be applicable to such associations or companies. * *. And such companies organized under this section shall pay the same fees for annual reports as are now paid by stock companies, but such association or companies shall receive no premiums nor make any dividends; but the word premiums herein shall not be construed to mean policy and survey fees nor the necessary expenses of such companies."

It would seem from an examination of the articles of incorporation and by-laws of the defendant, that it falls under the provisions of this section. The object of the defendant as declared in its articles of incorporation and by-laws is to afford financial aid and benefit to the families and beneficiaries of deceased members, and assistance to the members personally in case of sickness or disability. The payment of membership fees, annual dues and assessments is required, but these are to be used in paying the actual expenses of the association, and the benefits on account of death or sickness. Even the permanent fund contemplated in article fifteen of the by-laws, from unused admission fees, dues and assessments, must be used to pay the necessary expenses and benefits without assessment. The by-laws evidently contemplate that when there is enough permanent fund accumulated to pay a benefit, then no assessment shall be made. There is no possible way, without a violation of the articles of incorporation, that any fund can accumulate for peculation or division.

It is claimed, however, by the appellant, that section 1160 occurs in chapter 4, and that it affords immunity only from the provisions of that chapter, and that section 1161 is found in chapter 5, and applies to every company formed for the

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purpose of insuring lives, and hence the defendant must comply with the provisions of chapter 5. Chapter 5 enumerates only two classes of companies, joint-stock companies and mutual companies. It provides what each must do, before it is authorized to engage in business. Section 1160 authorizes a company which does not fall under either designation. Now it could not have been the intention of the legislature, after authorizing such company in section 1160, to impose such restrictions in sections 1161, 1162, and 1163, as would render the organization impossible.

Sections 1161 to 1163 must not be so construed as to repeal section 1160. They are in *pari materia*, and must be construed together, and must, if possible, be given force and effect. In order to do this, the word *every* must be limited to the stock and mutual companies referred to in the following sections. To construe it as applying to the companies authorized in section 1160, would prefer shadow to substance, and illustrate the maxim *qui hæret in litera, hæret in corrice.*

III. It seems to be insisted, however, that even section 1160 of the Code does not exonerate the defendant from making annual report and paying the requisite fee thereon. This company was not organized until April, 1881. It was not required to make annual statement until January 1, 1882. Code, §§ 1141 and 1167. This action was commenced on the 17th day of August, 1881, and was determined in the court below in September, 1881. It follows that the defendant could not have been in default in this respect when the action was commenced. The demurrer was properly sustained.

AFFIRMED.

59 134;
102 133;

BARR V. PATRICK.

1. **Tax Sale: conflicting claims to land: recovery of money paid to redeem.** Where defendant was the owner of land, subject to a vendor's lien, of which he had notice, but which was not a personal demand against him, and he allowed the land to be sold for taxes and afterwards to be sold on special execution in satisfaction of the vendor's lien, and the holder of the vendor's lien became the purchaser at the execution sale, and afterwards redeemed the land from the tax sales, *held*, that he could not maintain an action against the defendant to recover the money paid by him to redeem from the tax sales.

Appeal from Buchanan Circuit Court.

FRIDAY, JUNE 16,

THE petition in this case avers in substance that the defendant was the owner of a certain tract of real estate, and that while such owner he neglected to pay the taxes thereon for several years, and that the same was sold at tax sales; that during the time the defendant was such owner there was a vendor's lien against the same, which lien became the property of the plaintiff; that said lien was created by one Hallett in favor of Hugh Barr, and was not a personal claim against the defendant, but of which defendant had full knowledge; that the vendor's lien was duly established in an action between the parties hereto, and the premises were sold on special execution to the plaintiff on March 6, 1880; that on the 30th day of April, 1881, the plaintiff redeemed from the tax sales, and demands a personal judgment against the defendant for the amount he paid in redemption. There was a demurrer to the petition which was sustained. The plaintiff failed to plead over, judgment was rendered against him, and he appeals.

C. Ransier and H. W. Holman, for appellant.

Lake & Harmon, for appellee.

Barr v. Patrick.

ROTHROCK, J.—It is unnecessary to set out the grounds of the demurrer at length. They were to the effect that the defendant being the owner had the right to allow his land to be sold for taxes, and that as the vendor's lien was not a personal claim against defendant, but was superior to the claim of defendant, he had the right to cease paying taxes and allow the land to be taken in satisfaction of the vendor's lien.

We are unable to conceive any principle, legal or equitable, upon which this action can be sustained. The plaintiff and defendant had conflicting claims or liens upon the land. The plaintiff's rights were adjudged to be superior to the defendant's title, right, or claim. See 52 Iowa, 704. In pursuance of said adjudication, and without redeeming from the tax sales and asking that the amount paid by him be included in the decree, the plaintiff caused the land to be sold with the lien of the tax sales upon it, became the purchaser himself, and afterwards redeemed from the sales, and seeks to recover the amount paid in a personal action against the defendant. We think his claim to recover may be answered by the single consideration that when this property was offered at execution sale, whoever bid, did so upon the theory that the taxes were a lien and bid that much less than he would have given otherwise for the land. Besides there is no privity between these parties.

It is true as claimed by appellant that the owner of the land is personally liable for taxes thereon. But in this case the taxes were paid by the sale of the land, and we know of no principle by which a third person may redeem from the sale and sue the owner for the amount paid to redeem. The cases which hold that where a tax title is held invalid the holder thereof is nevertheless entitled to recover for the taxes paid by him, proceeds upon the ground that the owner is permitted to recover or retain his land by performing the duty which equity demands of him, which is the payment of taxes on the land.

But that rule can have no application where two parties

Munson v. Plummer and Keppel.

have a legal contest over their respective rights to the land, and where the successful party seeks to recover taxes which the other neglected to pay, or, it may be, purposely omitted to pay, upon the ground that he expected to lose the land. In such case there is no such privity between the parties that one can recover from the other, on account of taxes upon the property.

AFFIRMED.

MUNSON, ADM'R, v. PLUMMER ET AL., AND KEPPEL, INTERVENOR.

1. **Interest: RATE OF: AGENCY: FRAUD.** J., plaintiff's intestate, was agent of the intervenor, K., and, as such agent, represented to K. that he had sold K's forty acres for \$1,200 to E., and requested K. to forward to him a deed to deliver to E., which K. did. J. did not sell the land to E., but traded it to him for the lot in controversy, estimating the land at \$1,200 and the lot at \$2,000, and applying the difference on a debt due him from E. J. afterwards sold the lot to defendants for \$2,000—\$200 cash and the balance in mortgage notes bearing ten per cent interest payable annually. Some of the notes were paid. Judgment on foreclosure was obtained in this cause for \$1,113. On the trial of the cause as between plaintiff and K., as intervenor, *held* that, in estimating the amount which K. was entitled to recover as against the estate of J. interest should be computed on the amount admitted to be due K. at the same rate that was received on the sale of the lot, and that to compute such interest at six per cent per annum only, would be to allow the estate of J. to profit by his own fraud.
2. **Agency: FRAUDULENT MINGLING OF FUNDS: EXPENSE OF SECURING THE MIXED FUND: LIEN.** In the above case it was *held* that, in the absence of a showing that there were other creditors of the estate of J., besides the intervenor, or that there were no other funds out of which to reimburse the plaintiff, administrator, for expenses incurred by him on behalf of the estate, for the purpose of determining the amount due from the defendants, establishing the lien, and recovering to the estate the property, no part of such expenses nor of the costs of the intervention should be borne by the intervenor, but that he should recover the full amount of the money yet due him, with interest; also that he should have a lien therefor on the lot in controversy to the extent of the judgment against the defendants.

Munson v. Plummer and Keppel.

Appeal from Buchanan Circuit Court.

FRIDAY, JUNE 16.

THE plaintiff brought this action to recover the purchase price of a certain lot, and to foreclose a title bond given therefor. The intervenor claimed an interest in the amount which should be recovered, and a lien upon the lot in question therefor. Judgment was rendered against the defendants, in favor of plaintiff, for \$1,113; and in favor of intervenor for \$714.52. The intervenor appeals. The facts are stated in the opinion.

M. L. Owens and D. W. Bruckhart, for appellant.

C. E. Ransier, for appellee.

DAY, J.—On the 17th day of October, 1878, the plaintiff commenced this action, claiming of the defendants E. M. and J. W. Plummer the sum of \$2,000, and the foreclosure of a title bond executed to said defendants by James Jamison. The defendants answered alleging that they were entitled to certain credits which had not been allowed. On the 28th day of May, 1879, David Keppel filed his petition of intervention, claiming an interest in the fund which might be found due the plaintiff, and a lien therefor upon the lot described in the title bond to defendants. On the 7th day of November, 1879, the cause was tried as between the plaintiff and the defendants, resulting in a judgment for \$1,810.30, with interest at ten per cent and a foreclosure of the title bond.

The defendants appealed to this court, and on the 21st day of October, 1880, a decision was rendered modifying the judgment in the court below. See 54 Iowa, 758. On the 12th day of April, 1881, the cause came on for hearing upon *procedendo* from this court, and the former judgment was so far modified as to reduce the amount of the judgment and lien upon the premises to the sum of \$1,113, with interest at ten per cent from November 7, 1879, the date of the original judgment. On the 6th day of April, 1880, the plaintiff filed

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an answer to the petition of intervention, and on the 16th day of February, 1881, the plaintiff filed an amendment to said answer. On the 12th day of April, 1881, the action between the plaintiff and intervenor came on for trial to the court as an action in equity. The facts established as to the intervenor's claim are as follows: On the 27th day of April, 1857, the intervenor, David Keppel, a resident of the State of Pennsylvania, placed in the hands of his nephew, James Jamison, the plaintiff's intestate, \$500 to invest in land in Iowa. Jamison invested \$400 of said money in forty acres of land, which he caused to be conveyed to David Keppel, and on the 14th day of October, 1864, he accounted to Keppel for the balance of the \$500 and interest. On the 28th of June, 1872, James Jamison represented by letter to David Keppel that he had sold his forty acres of land for \$1,200, and sent him a deed to be executed to Henry Edgecomb. At this time he furnished a statement of taxes paid amounting to \$140, and that the amount due Keppel on the transaction was \$1,060. In this letter Jamison said: "The payments can be made to suit you. If you wish I will make it long or short. Say first payment to be one-third or one-fourth down; balance one and two years; use ten per cent—use payable annually." On the 10th day of October, 1872, Jamison wrote Keppel as follows: "Your deed came to hand all right. Shall remit to you whenever I get it from the purchaser; it is all right the money was not paid at the time."

Jamison did not sell the land to Edgecomb, as he informed Keppel he had done, but he traded it for the lot now in controversy, estimating the lot at \$2,000, and the land at \$1,200, applying the difference on a debt due him from Edgecomb, and taking the title in his own name. On the 23d day of July, 1872, Jamison sold this lot to the defendant, Elizabeth Plummer, for \$2,000, \$200 cash, and the balance in notes bearing ten per cent interest, payable annually, the interest if not paid when due to bear the same rate of interest as the principal. Some of these notes were paid and upon the remainder

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of them the plaintiff recovered the judgment for \$1,113, before referred to. On the amount for which Jamison represented he had sold the land, he paid Keppel, March 29, 1873, \$300; May 17, 1875, \$100; May 25, 1877, \$14. The plaintiff pleaded the statute of limitations, but, as that is not relied upon in argument, the facts respecting it need not be stated.

I. The court below allowed the intervenor but six per cent simple interest, upon the balance of the \$1,060 admitted

to be due him. In this, we think, the court erred.
1. INTEREST: **rate of:** Jamison fraudulently traded the land, instead of
agency: fraud. selling it, and took the title in his own name.

Afterward he sold the lot so obtained, and took notes bearing ten per cent interest, payable annually, the unpaid interest bearing the same rate of interest as the principal. Some of these notes have been paid him, and for the others his estate has recovered a judgment. We know of no principle of equity which will enable Jamison or his estate to make a profit out of this fraud. Every principle of equity holds the estate liable to account for all that was received by Jamison or his estate on account of the sale of the lot. The estate should pay the same rate of interest that was received on the sale of the lot. In other words, Jamison and his estate should be treated as holding the notes and proceeds in trust for Keppel.

II. The plaintiff claimed an offset to the intervenor's demand, which the court allowed to the extent of \$368.20. The

2. AGENCY: **mingling of funds: expenses of securing the mixed fund: lien.** facts respecting this claim are embraced in an agreed statement, which is substantially as follows:

When plaintiff was appointed administrator, the property in controversy was in possession of E. M. Plummer, one of the defendants, under a title bond from James Jamison, deceased. Said bond was foreclosed in this suit of plaintiff against defendants, upon which there was a trial, the plaintiff having employed counsel, whose services were reasonably worth \$100. In the trial in the Circuit Court plaintiff recovered judgment in the sum of \$1,810. Upon said judgment an execution issued, and, on the 13th

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day of December, 1879, the premises were sold to the plaintiff, as administrator. The plaintiff paid the costs of the sheriff's sale, which amounted to \$63.95. Plaintiff caused said premises to be insured in his name as administrator, for which he paid \$410. On the 29th day of April, 1880, the plaintiff commenced a proceeding against the sheriff to obtain a sheriff's deed to said premises upon the sale, which services were worth \$15. The court refused to entertain the proceedings. The defendants, Plummers, appealed the case of the foreclosure of the bond before the sale on execution above named, upon which appeal the Supreme Court modified the judgment by allowing the defendants a credit of about \$800 more than the Circuit Court allowed them. The service of attorney for the plaintiff in said appeal matter was reasonably worth the sum of \$75. The Supreme Court taxed the costs of appeal against the plaintiff, for which he is liable as administrator, in the sum of \$78.25, and \$16 printing bill. The administrator paid \$2.15 for making and recording the sheriff's deed for said premises, which deed he received the 24th of December, 1880. After receiving said sheriff's deed, Plummers refused to vacate said premises and plaintiff brought an action of forcible entry and detainer, and employed an attorney, whose fee was reasonably worth \$10. In said matter plaintiff recovered judgment against the defendants and paid costs amounting to \$5.75. It is apparent from the foregoing statement that all these expenses were incurred by the administrator, on behalf of the estate, for the purpose of determining the amount due from defendants, establishing the lien, and securing to the estate the property. The primary benefit from the litigation ensues to the estate. The intervenor is entitled to the payment of his claim at all events, either in full, or *pro rata*, and the greater the amount of it which can be recovered from the defendants, so much the better for the estate. The fact that, through these proceedings, the intervenor is enabled to enforce a lien against this property is not material, as between him and the administrator. It may be that as between the inter-

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venor and other creditors of the estate, the intervenor should pay the costs of the proceedings through which he has been enabled to establish a lien and become a preferred creditor. But it is not shown that there are any creditors of the estate. It may also be, that if there was no other property of the estate of James Jamison, out of which the administrator could be reimbursed for expenditures on behalf of this land, he would be entitled to have these disbursements allowed out of the property in question. But this portion of the case is submitted upon an agreed statement of facts. It does not appear that there is no other property of the estate of Jamison. We cannot presume that such is the fact, nor frame our decree upon a supposition that such fact may exist. Inasmuch as no such fact is embraced in the agreed statement we must rather presume that it does not exist. It is urged that the record is not before us in such shape as to entitle the intervenor to a trial *de novo*. But this position, we think, is not well founded. Upon the record before us the intervenor is entitled to judgment for \$1,060, with interest compounded annually at ten per cent from July 23, 1872, to November 7, 1879, less the several credits before referred to and interest upon that sum from November 7, 1879, at ten per cent per annum. For \$1,113 of this judgment intervenor is entitled to a lien upon the lot referred to in the pleadings being lot 8, block 5, Stoughton and McCren's addition to the village of Independence. The intervenor is also entitled to the costs of intervention. A decree will be entered in this court in accordance with the foregoing views, or the appellant may have the cause remanded to the court below for final decree.

REVERSED.

Van Horn v. Smith.

59	142
85	569
59	142
95	752
59	142
107	458
59	142
122	236
59	142
143	648

VAN HORN v. SMITH, SHERIFF, ET AL.

1. **Assignment for Benefit of Creditors: FACTS CONSTITUTING: VOID FOR PARTIALITY.** Where a husband executed to his wife an assignment of all his personal property (his real estate being encumbered to about the full extent of its value), the only consideration of which assignment was an agreement made by the wife, in a chattel mortgage which she executed the next day, which embraced all the property included in the assignment, and wherein the creditors of the husband were divided into three classes, which creditors she agreed to pay, giving preference to the classes in their order, *held* that the assignment and chattel mortgage constituted parts of the same transaction, and, in legal contemplation, amounted to a general assignment for the benefit of creditors; and that, as such an assignment, it was void, because it gave preference to certain creditors.
2. **Practice: INSTRUCTIONS: ERROR CURED BY JUDGMENT.** Where there was error in neglecting to submit to the jury plaintiff's demand for rent, but the defendant consented to judgment for the highest amount that could have been recovered under the evidence, *held* that the error was cured by the judgment.
3. **— : ORDER OF ARGUMENT: DISCRETION OF COURT.** Where, upon the principal issue in the case, the burden of proof was on the defendant, the order of argument rested largely in the discretion of the court; and the fact that defendant was allowed to open and close the argument is no ground for reversal.
4. **Evidence: DEPOSITION: READING PART ONLY.** Where defendants had taken plaintiff's deposition, they were properly allowed, against plaintiff's objection, to read a part of it, without reading the whole, for the purpose of establishing an admission on the part of plaintiff. The plaintiff might have introduced the whole of it, if she had been so advised.

Appeal from Marshall Circuit Court.

FRIDAY, JUNE 16.

In the first count of her petition the plaintiff alleges that the defendants wrongfully seized and converted to their own use a stock of goods of which the plaintiff was the owner, whereby she was damaged in the sum of \$10,000.

In the second count of her petition the plaintiff alleges that the defendants took possession of certain premises of which

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she was the owner and occupied them for six months, and that the rental thereof was reasonably worth \$300. The cause was tried to a jury which returned answers to special interrogatories, and a general verdict for the defendant. The motion for a new trial was overruled as to the first count.

Upon the second count, by consent of defendant, judgment was rendered in favor of plaintiff for one hundred and twenty-five dollars and ten dollars costs. The plaintiff appeals. The material facts are stated in the opinion.

Henderson, Carney and W. A. Tewksbury, for the appellant.

Boies & Couch and Nichols & Burnham, for the appellee.

DAY, J.—On the 21st day of April, 1876, W. B. Van Horn was in the drug business in the city of Vinton, Iowa. He owed debts, secured by mortgages upon all his real estate, which was encumbered to about the full extent of its value, amounting to about \$11,700. The defendant, S. H. Watson, was the holder of this debt to the extent of \$2,640 and interest, for which he held a third mortgage upon the real estate referred to. W. B. Van Horn also owed unsecured debts amounting to about \$7,000, of which \$440 was owing to defendant Watson. On the 21st day of April, 1876, W. B. Van Horn, for the expressed consideration of \$7,000 executed to his wife, the plaintiff, an assignment of his entire stock of goods, wares and merchandise, whether in store or in transit, all books of account, and his personal property not exempt from execution.

The plaintiff at that time had no property other than the store room in which the goods were kept, valued at about \$3,500. She paid no cash consideration, and was fully aware of her husband's financial condition.

She claims that at the time of the assignment, and in consideration thereof, she agreed unconditionally to pay all her husband's unsecured debts. The jury, however, found speci-

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ally, that the only agreement made by the plaintiff in consideration of the transfer to her, is contained in a chattel mortgage which she executed the next day, and this finding is abundantly supported by the evidence. This chattel mortgage embraces all the property included in the assignment to the plaintiff, and purports to be executed to certain persons named in the schedules "A", "B" and "C".

Schedule "A" embraces thirty creditors, representing debts amounting to \$4,545.94. Schedule "B" embraces only the defendant Watson, representing a debt of \$440. Schedule "C" embraces other creditors, representing debts amounting to \$2,159.76.

In the chattel mortgage the plaintiff agrees to pay: *First*, to the creditors named in schedule "A" twenty-five per cent of their claims, on the first day of June, 1876, and a like per cent on the first day of each succeeding month. *Second*: To the creditors named in schedule "B" on the first day of the month after, fifty per cent of the debts named in schedule "A" shall be paid, ten per cent, and a like per cent on the first day of each succeeding month, with interest at ten per cent. *Third*: To the creditors named in schedule "C" on the first day of the month, after the debts referred to in schedule "B" shall be paid, ten per cent, and a like per cent on the first day of each succeeding month, with interest at seven per cent. The creditors named in schedule "C" are all relatives of the plaintiff, the bulk of the debts being held by her father and sister. On the 14th day of March, 1877, she executed a mortgage upon her real estate, before referred to, to secure these creditors.

The chattel mortgage contains the following provision: "This transfer and assignment is upon the further express condition and agreement, to-wit: That the creditors named in schedule "A" shall have the prior and paramount interest in, and lien upon, said property, until fifty per cent of their respective claims, hereby secured, are paid. Then they and the creditors in schedule "B" shall stand on an equality as to

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the said property, but their interest in and lien upon it shall be paramount to the creditors named in schedule "C". That the possession of all property herein described shall continue with the grantor until she is in default in some of the payments promised by her for forty days, and even then the owner of the payment so in default for said time shall be entitled hereunder only to the possession of so much of said property as is necessary to pay said payments so in default for said time * * * *. Any creditor accepting or taking any benefit arising out of this instrument or the agreement between grantor and W. B. Van Horn, agrees that he will not enforce or attempt to enforce payment of the indebtedness of said W. B. Van Horn, until the same becomes due under the promise of the grantor to pay the same."

This chattel mortgage was left in the possession of the plaintiff's legal adviser but was not recorded for some time. The defendant, Watson, never assented to, nor in any way recognized or accepted the provisions of this chattel mortgage.

On April 28, 1876, S. H. Watson served notice of action, and on May 3d filed petition claiming of W. B. Van Horn the several sums due from him. On May 18th Watson amended his petition alleging that Van Horn had disposed of his property with intent to defraud his creditors, and asking an attachment, which was duly issued, and, on the same day levied upon the stock of goods embraced in the assignment to the plaintiff. Afterward, pursuant to finding of a sheriff's jury that the property was of a perishable nature, it was duly sold by the sheriff. All the real estate of Van Horn was absorbed by the mortgages, which were prior in time to that of defendant Watson. The evidence shows clearly that it was the expectation of the plaintiff to pay the debts referred to in her mortgage out of the proceeds of the sale of the property assigned to her. After the assignment, no visible change was made in the possession of the goods, and the business was conducted, apparently, as before.

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I. The appellant complains of certain instructions to the effect that the bill of sale, by placing the property of Van Horn beyond the reach of the ordinary process of the law, and driving his creditors to the necessity of bringing an action to determine the validity of plaintiff's title, hindered the creditors of Van Horn, and that if it was the intention of Van Horn and the plaintiff to so hinder and delay the defendant Watson, the bill of sale was fraudulent, and that if the so called mortgage was a part of the original transaction, the transaction was invalid and void, as the mortgage evinces purpose to hinder the collection of his debt. We do not deem it necessary to determine the validity of these, and like instructions, as in the view which we take of the case, under the established facts of this case, the transaction is void as to the defendant Watson for a different reason.

The conveyance by Van Horn to his wife embraced all his available property. The jury have found specially that the

1. ASSIGNMENT for benefit of creditors: facts constituting : void for partiality.

mortgage contains the true understanding and agreement of the parties to the bill of sale as to the time and manner in which to pay the indebtedness assumed by plaintiff, and that such understanding and agreement form the only consideration paid or agreed to be paid by plaintiff for the goods mentioned in the bill of sale, and that at the date of the bill of sale in question plaintiff did not have, and both parties thereto knew she did not have, the means to pay the debts of Van Horn, assumed by her, as the same came due. The bill of sale, and the mortgage, under the findings of the jury, constitute parts of the same transaction, and, in legal contemplation they amount simply to a general assignment for the benefit of creditors.

As a general assignment for the benefit of creditors it is void because it gives a preference to creditors. It provides that the creditors named in schedule, "A" shall be paid fifty per cent of their debts before Watson, who is embraced in schedule "B" shall be paid any thing; and that the creditors named in schedule "A" shall have a prior and paramount

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interest in and lien upon the property until fifty per cent of their respective claims are paid. That a general assignment for the benefit of creditors, which prefers some is void, see *Burrows v. Lehndorf*, 8 Iowa, 96; *Cole v. Dealham*, 13 Iowa, 551; *Van Patten & Marks v. Burr*, 52 Iowa, 518. As the transfer of the property in question was invalid, it was subject to seizure as the property of W. B. Van Horn, for the satisfaction of the debt of the defendant.

II. The plaintiff complains of the failure of the court to submit to the jury the claim of the plaintiff for rent of the premises. The evidence shows that defendants ^{2. PRACTICE: instructions: error cured by judgment.} occupied the plaintiff's premises from the 18th of May to the 27th of June, two and one-third months, when they tendered the keys to the plaintiff. The highest rental value placed upon the premises by any witness is \$50 per month. By consent of defendants, judgment was rendered in favor of the plaintiff on account of the rent for \$125. If there was error in neglecting to instruct upon this issue it has been cured by the action of the defendants.

III. Upon the conclusion of the testimony the court granted to the defendants the right to open and close the argument. This action of the court is assigned as ^{3. —: order of argument: discretion of court.} error. The defendants admitted the taking of the goods, but denied that the plaintiff was the owner thereof, and denied the other material allegations of the petition. The bill of sale, upon its face, vested the legal title to the goods in plaintiff. The defense of the defendants consisted in showing the invalidity of this title. This was the principal issue in the case and the burden of proof, as to it, was upon the defendants. Under the circumstances of this case, the order of argument rested largely in the discretion of the court, and does not justify a reversal unless there is clearly an abuse of discretion and prejudice. See *Smith, Toogood & Co. v. Clarke*, 9 Iowa, 376; *Woodward v. Laverty*, 14 Iowa, 381; *Viele v. Germania Ins. Co.*, 26 Iowa, 9 (44); *Ashworth v.*

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Grubbs, 47 Iowa, 353; *Delaware Co. Bank v. Dumont*, 48 Iowa, 493.

IV. The defendants took a deposition of the plaintiff, and were allowed, against the objection of the plaintiff, to read a part of it to the jury. This action is assigned as 4. EVIDENCE: deposition: reading part error. A portion of the deposition of plaintiff only. was admissible as containing an admission. The case differs from *Kilbourne, Jenkins & Co. v. Jennings & Co.*, 40 Iowa, 473, cited by appellant, in which the deposition was that of a party in whose favor it was introduced and was not offered to establish an admission. Besides the plaintiff introduced other portions of her deposition and might have introduced it all if she had been so advised. The argument of the appellant is general, without division or specific reference to the errors assigned. What we have said substantially disposes of the case. We discover in the record no error which could have operated to the prejudice of the plaintiff.

AFFIRMED.

58 148
95 130

CARTON & CO. V. ILLINOIS CENTRAL RAILROAD CO.

1. **Railroads: LEGISLATIVE REGULATION OF RATES: INTER-STATE COMMERCE: CONSTITUTIONAL LAW.** If the language of chapter 68, laws of 1874, is to be construed so as to include contracts for the transportation of freights to points without the State, then it is repugnant to Article 1, section 8, of the Constitution of the United States, which confers upon Congress the "power to regulate commerce with foreign nations and between the states," and is then for that reason, in that particular, void, and will not support an action brought to recover of the defendant freights charged in excess of the rates provided in that act, on goods shipped from Ackley, in this State, to Chicago, in the State of Illinois, on a contract for through shipment at a given rate per car load.
2. — : — : — : **LEX LOCI CONTRACTUS.** While it is true that the contracts of shipment set out in this case are entire contracts, and while it may be conceded that the laws of this State enter into and become a part of contracts made within the State, yet this doctrine must be limited to laws which are valid; and since the law relied on if applicable to these contracts at all, is so far void, it cannot enter into and become a part of those contracts. BECK, J. dissenting.

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Appeal from Hardin Circuit Court.

WEDNESDAY, JULY 12.

This is an action to recover certain alleged excessive freight charges paid by the plaintiff to the defendant for transporting grain from Ackley in this State to Chicago, Illinois. The cause was tried in the court below without a jury, and upon an agreement as to facts, and judgment was rendered for the defendant for costs. Plaintiffs appeal.

Huff & Reed and Brown & Carney, for appellants.

John F. Duncombe, for appellee.

ROTHBROCK, J.—I. It appears from an agreed statement of facts that between the 11th day of April, A. D. 1875, and the 14th day of April, 1876, the plaintiffs delivered to the defendant at Ackley, Iowa, to be shipped to Chicago, Illinois, through defendant; 129 car loads of wheat, and the defendant fixed the price and charged for freight thereon from Ackley to Chicago thirty-seven cents per 100 pounds, or \$74 per car load of 20,000 pounds; and between April 14th, 1876, and March 11th, 1878, one hundred and twenty cars more, for which the defendant received and charged for shipment the same rate. The grain was loaded at Ackley in cars furnished by the defendant and carried through in bulk to Chicago in a continuous shipment. All of the cars were billed through from Ackley, Iowa, to Chicago, Illinois, and the defendant fixed the rate of freight and gave plaintiffs through shipping receipts to Chicago.

It is claimed that the freight thus charged and paid by the plaintiffs was in excess of that authorized by the laws of Iowa at that time in force; that the distance from Ackley, by defendant's road, to Dubuque on the Iowa State line is 132 miles; and the distance from Dubuque to Chicago by defendant's line is 202 miles, making a total distance through both

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states of 334 miles, and that the rate of freight fixed by the law of Illinois was, at that time less than the rate fixed by the statute of Iowa. Damages are claimed for the difference between what was authorized by the law of Iowa to be charged for the transportation, for the whole distance, also for attorney's fees for prosecuting the action.

It is claimed by counsel for the defendant that the law of
I. RAILROADS: Iowa then in force, being chapter 68 of the acts
legislative regulation of of the Fifteenth General Assembly, by its plain
rates: inter- language and meaning had no application to con-
state com- tracts made for the transportation of freight into
merce: con- other states. Section three of that act, so far as
stitutional law.
applicable to this case, is as follows:

"The tariff of rates established in the following schedule shall be considered the basis on which to compute the compensation for transporting freights, goods, merchandise or property over any kind of railroad within this State * *."

Some of us think this language excludes contracts for the transportation of freight to points without the State, but as the plaintiffs claim that these were contracts made in Iowa for through shipments to Chicago, and that by tacking the law of Illinois to the law of Iowa thus making it one continuous haul, the rate for the continuous haul being in excess of that authorized by the law of Iowa, such excess may be recovered back. We think it is not necessary to put a construction upon the law of this State in this regard, but rest our decision upon another ground.

It is claimed by the defendant that whatever construction may be put on the law of this State, it can have no application to shipments of freight from this State to other states, because State legislation of that character is void as being contrary to Article 1, Section 8, of the Constitution of the United States, which confers upon Congress the power "to regulate commerce with foreign nations, and among the several states." Now if this position be correct it is needless to enter into a discussion of all the questions, so elaborately and ably discus-

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sed by counsel in this case. If the law of Iowa, conceding that it contemplates the control or regulation of shipment of freight to other states, is in that particular void, as being an infraction of the federal Constitution, it cannot be enforced, and the defendant was not bound to obey it, and could fix its own freight tariff, and the plaintiffs cannot recover for a violation of the statute, whatever other rights they may have.

It is not claimed that the fixing of rates of freight shipped from one State into another is not a regulation of commerce. "Any regulation of the transportation of freight upon the high seas, the lakes, the rivers, or upon the railroads, or other artificial channels of communication, is a regulation of commerce itself." *The City of Council Bluffs v. The K. C., St. J. & C. B. R. Co.*, 45 Iowa, 338. This has been repeatedly held by the Supreme Court of the United States. *Reading Railroad Co. v. Pennsylvania*, 15 Wallace, 232; *Passenger Laws*, 7 Howard, 283; *State of Pennsylvania v. Wheeling Bridge Co.*, 18 Howard, 421; *Gibbons v. Ogden*, 9 Wheat, 1.

There is a line of cases determined by the Supreme Court of the United States, which hold that it is competent for the states, in the absence of legislation by Congress, to legislate respecting inter-state commerce. But those cases have been such as relate to bridges or dams across streams wholly within a State, police laws, laws relating to pilots of vessels, health laws, and the like. See *Cooley v. Board of Wardens*, 12 Howard, 299; *Gilman v. Philadelphia*, 3 Wallace, 713.

But that court has always held that the power to enact laws upon subjects in their nature national, and not merely local, is exclusively with Congress. In *Cooley v. Board of Wardens, supra*, it is said: "Whatever subjects of this power are in their nature national or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

That the act of this State assuming that its object and purpose was to control and regulate the shipments of freight

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to other states is of the character last defined, appears to us to be very clear, and we are not without authority upon this question, and from a source which so far as questions involving the construction of the Federal Constitution are involved, are binding upon this court, and all other courts in the Union.

The legislature of the State of Pennsylvania enacted a law imposing a tax upon freight taken up within the State and carried out of it, or taken up without the State and carried within it. The Pennsylvania Railroad Company refused to pay the tax upon the ground that the law was unconstitutional and void, in conflict with the Constitution of the United States which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several states." In the case of the *State Freight Tax*, 15 Wallace, 232, involving the validity of this act, it was held that the tax imposed thereby was upon the freight carried, and that it was a regulation of inter-state transportation or commerce among the states. The court in that case say: "If, then, this is a tax upon freight carried between states and a tax because of its transportation, and if such tax is in effect a regulation of inter-state commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States."

In *Henderson v. The Mayor of New York*, 92 U. S., 272, the following language is used: "It is said, however, that under the decisions of this court there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the *Passenger Cases*; by the decisions of this court in *Cooley v. The Board of Wardens*, 12 Howard, 299; and by the cases of *Crandall v. Nevada*, 6 Wall., 35; and *Gilman v. Philadelphia*, 3 Wall., 713. But this doctrine has always been con-

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troverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and in the case of *Cooley v. The Board of Wardens*, it is said that whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

In the case of *Railroad Company v. Maryland*, 21 Wall., 456, it was determined that the charter of the Baltimore and Ohio Railroad Company for constructing and operating a branch railroad from Baltimore to Washington, upon a stipulation contained in the charter that the company should pay the State of Maryland one-fifth of the amount of money received for the transportation of passengers, was not an infraction of the Federal Constitution as being a regulation of inter-state commerce. It is there said: "The exercise of power on the part of the State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the states. Such an imposition, whether relating to persons or goods, we have decided the states cannot make, because it would be a regulation of commerce between the states in a matter in which uniformity is essential to the rights of all, and therefore requiring the exclusive legislation of Congress."

In that case the State of Maryland in granting the charter especially reserved the right to part of the earnings of the road, and the power to do so was upheld upon the principle that if the State had itself built the road and operated it, it would have been entitled to its earnings.

The cases of *State v. Munn*, 94 U. S., 113; *C., B. & Q. R. R. Co. v. Iowa*, Id., 155; and *Peck v. C., & N. W. R. R. Co.*, Id., 164, do not appear to us to sanction the validity of acts of the State legislature regulating the transportation of freight and passengers between the states. They merely

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determine the power of the states to fix reasonable warehouse charges, and reasonable charges for transportation of freight within the boundaries of the states respectively, and that when such power is exercised, although it may incidently affect commerce between the states, yet the laws of the states are not regulations of inter-state commerce, because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case it appears to us is conclusively shown by the reasoning in the later cases of *Hall v. De Cuir*, 95 U. S., 485; and *R. R. Co. v. Hanner*, Id., 465.

II. It is urged with great earnestness that these contracts of shipment are entire contracts, and having been entered into in Iowa, the laws of this State entered ^{2 — : lex loci} into and became a part of the contracts, and the contractus.

statute fixing the rate governed the price for the entire distance. This rule is, no doubt, correct when applied to a valid enactment of the legislature of a State where a contract is entered into, and no one doubts the power of a common carrier to bind itself to ship freight beyond State lines or even to foreign countries and beyond the terminus of its line of transportation. Under such a contract it is everywhere held that the carrier is bound to perform his contract, and is liable for loss, by negligence. But this position of counsel, it seems to us, begs the question, because if the law of Iowa under consideration is an unauthorized regulation of inter-state commerce it cannot enter into and become part of any contract. This position of counsel forcibly illustrates the correctness of our conclusion that the law in question, if held to have been intended to operate upon inter-state traffic, is directly and palpably contrary to the constitution of the United States. If the law entered into and became part of the contract of shipment we would have a law of Iowa which would control and regulate the transportation of freight, not only to the remotest parts of the states and territories of this country, but extending to all the nations of

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the earth to which lines of common carriers extend, and to which local carriers may undertake to transport goods. That such legislation is national in its character it seems to us must be conceded.

If we are correct in these views there is but little more necessary to be said in this case. The plaintiffs claim to recover because the amount of freight-money exacted by the defendant was in excess of the rate fixed by the law of Iowa. The contract of shipment was an entirety. It cannot be severed and made to apply partly to the shipment in Iowa and partly to that in Illinois. It was the right of the defendant to disregard any laws which sought to regulate shipments to points without the State, and make its own contracts. Having done so, the plaintiffs cannot recover under any State law, simply because it is void as being repugnant to the Federal Constitution. Whether the plaintiffs are entitled to any relief independent of the statute, we do not determine, because that question is not in this case.

AFFIRMED.

BECK, J., dissenting.—I. I am unable to concur in the arguments and conclusions announced in the preceding opinion of the court prepared by Mr. Justice ROTHROCK. The case is one of great importance, as the decision affects the interests of all the people of the State. This consideration has stimulated me in its careful examination with the purpose of preparing an extended discussion of the doctrines which, in my opinion, should control the decision of the important questions involved in the case. But I am unable, within the limited time which other judicial duties permit me to devote to the case, to carry out my purpose, and I am compelled to limit myself to a brief statement of the principles upon which I base my dissent to the opinion of the majority of the court.

II. It is shown by the record before us that the defendant received the grain shipped by plaintiffs for transportation to the city of Chicago. A contract was then entered

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into by the defendant for the carriage of the grain from Ackley to Chicago. This contract was made in Ackley and is therefore subject to the laws of this State applicable thereto.

III. It is competent for the State to enact the statute in question, unless it should be found to be in conflict with the Constitution of the United States, as a regulation of commerce.

The statute is not in conflict with the federal constitution for the following reasons:

IV. Conceding the statute has the effect to regulate commerce, it is enacted in the exercise of a power which is vested concurrently in the State and National governments. And as it is not in conflict with any law of the United States, and as Congress has not enacted any statute upon the subject, it cannot be regarded as an encroachment upon the authority of the general government. Until Congress assumes the exercise of its authority over the subject of the statute in question, the State is free to legislate upon it.

V. In my opinion regulations of commerce which impose burdens and restrictions thereon, are only forbidden to the State by the Constitution of the United States.

The states are free to enact all laws which will aid in securing the expeditious and cheap transportation of property used in the commerce of the country. Of this character are statutes providing for the construction of the mediums of transportation of property, for its protection while in transit, and for the protection of the means of transportation used by common carriers. Enactments prescribing the duties and obligations of carriers are of the same character and class.

It must be remembered that railroads do not constitute commerce. They are means used by commerce. The corporations operating them are common carriers, employed in the commerce of the country. Burdens, impediments and restrictions may be imposed upon commerce by these common carriers. This may be done by unnecessary delays and unreasonable and unjust charges for carrying goods, and the

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like. Statutes which remove burdens and restrictions imposed in this way upon commerce, which protect it from unjust exaction by common carriers, are not regulations of commerce within the contemplation of the Constitution of the United States. The statute of the State brought in question in this case is of this character. It was intended and it operated to protect and stimulate commerce by preventing oppression and discriminating charges for the transportation of property used in the commerce of this country.

These conclusions, in my opinion, are based upon doctrines well established by decisions of the United States Supreme Court and of this court.

DICKEN v. MORGAN.

59	157
116	708

59	157
119	299

1. **Practice: EXCEPTION TO DECREE IN EQUITY: TRIAL DE NOVO.** In equitable actions triable anew upon appeal, it is not necessary to take an exception to a decree in order to entitle a party to a trial *de novo* in this court.
2. **Contract: SALE OF LAND: PARTIAL FAILURE OF CONSIDERATION.** Where plaintiff sold land to the defendant, and for \$100 of the consideration agreed to procure the establishment of a highway along one side of the land, which he failed to do, *held*, in an action to recover a balance of the purchase-money of the defendant, that he could not recover the \$100.
3. **Highway: ESTABLISHMENT OF: IRREGULARITY: RES ADJUDICATA.** Where plaintiff agreed to procure for defendant the establishment of a highway, but in the proceedings there was a slight irregularity, and afterwards, in an action against the road supervisor, there was a trial involving the validity of the road, and the opening of the same was perpetually enjoined, *held* that this must be regarded as an adjudication binding upon the public, and all persons interested including the plaintiff, that no road was legally established. *ADAMS, J., dissenting.*

Appeal from Ringgold District Court.

WEDNESDAY, JULY 12.

ACTION to foreclose a mortgage. The defendant for answer avers a partial failure of consideration. The undisputed

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facts are that the defendant purchased of the plaintiff eighty acres of land; that he paid two hundred dollars in cash and gave his notes for \$900, and a mortgage upon the land to secure them; that he paid the full amount except one note for two hundred dollars. The defendant claims that the price of the land was \$1,000; that the plaintiff, however, as a part of the trade agreed to procure the establishment of a highway across one side of the land; that in consideration that he would do so the defendant agreed to give him \$100, making the whole amount, \$1,100, or \$900 in addition to the \$200 paid down; he further claims that the plaintiff failed to procure the establishment of the highway.

The plaintiff claims that the purchase price of the land was \$1,100. He admits that he promised incidentally to procure the establishment of the highway, but denies that any part of the \$1,100 was the consideration for doing so. He further denies that he has failed to procure the establishment of the highway.

The court found that of the \$1,100 the sum of \$1,000 was the purchase price of the land, and the sum of \$100 was agreed to be paid as the consideration for procuring the establishment of the highway. The court also found that the plaintiff had failed to procure it, and rendered a decree accordingly. The plaintiff appeals.

Laughlin and Campbell, for appellant.

Askren and Spence, for appellee,

ROTHROCK, J.—I. No exception was taken to the decree, and the defendant insists that without such exception, no objection can be properly raised to it in this court.

I. PRACTICE: exception to decree in equity: trial de novo. He cites *Roberts v. Cass*, 27 Iowa, 225. But that was an action at law. The case before us is

an equitable action, triable anew upon appeal.

In *Phipps v. Penn*, 23 Iowa, 30, a doubt was expressed whether under the Revision an exception to the decree in an

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equitable action should not be taken to justify a trial upon appeal. But it does not appear to have ever been so held. We see nothing in our present statute upon the trial of equitable actions which requires such exceptions to be taken.

II. We are inclined to think that the evidence sustains the defendant's proposition that the sum of \$100 of the \$1,100 was to be paid to the plaintiff as the consideration for his agreement to procure the establishment of the highway. We come then to the question as to whether he performed his ^{2. CONTRACT: agreement.} ~~sale of land : partial failure of consideration.~~ establishment of a highway, and they appear to have been regular except in one respect. A petition signed by the plaintiff and twenty-one others was filed in the auditor's office. A commissioner was appointed to examine the proposed road and report. The commissioner made the examination, laid out the road, and recommended its establishment. A day was fixed by the auditor for final hearing. Upon the day fixed it appeared that no claims for damages had been filed and that no objections were made. The auditor accordingly made an order that the road be established. At the next meeting of the board of supervisors the action of the auditor was approved.

Before proceeding to consider the objection urged by the defendant to the validity of the establishment of the road, we will state that according to the abstract the road described in the record introduced in evidence does not appear to be the road in controversy, but a different road, running parallel to the road in controversy and a mile farther south. But no allusion is made to this fact by counsel on either side. They have assumed in their arguments that the road described in the abstract of the record is the road in controversy, and the witnesses seem to regard it as the same road. We have concluded, therefore, that a mistake was made in printing the abstract, that the word *southeast* was used where the word *northeast* was intended.

Proceeding upon this theory, we come to the consideration

Dicken v. Morgan.

of the objection urged by the defendant against the validity of the establishment of the road. Section 934 of the Code provides that the auditor in appointing a day for final hearing

3. HIGHWAY : establishing of ; irregularity : res adjudicata. ing shall appoint a day not less than sixty, nor more than ninety days' distant. The appointment was made February 27th, 1875, and the day appointed for final hearing was May 29, 1875.

The auditor, probably not observing that March has thirty-one days, appointed a day for final hearing ninety-one days distant. The defendant contends that this being so, the auditor, on the day appointed for final hearing, had lost all jurisdiction, and that his order made on that day was void, and that no subsequent approval of the board could make it valid.

Whether this position be correct or not, we do not think it necessary to determine. That the action of the auditor was irregular, and erroneous, to say the least, must be admitted. It appears that in the year 1877 one Cooper commenced an action to enjoin one Ramsey, the road supervisor, from opening the road in controversy, and that after the substitution of J. H. Morgan, as party defendant, there was a trial involving the validity of said road and the opening of the same was perpetually enjoined.

This must be regarded as an adjudication, binding upon the public, and upon all persons interested, that no road was legally established. The proper party defendant was before the court to test the question as to whether or not the road was a legal highway. The plaintiff's obligation bound him to procure a highway, not merely upon paper, but one which could be opened and traveled. In this he failed. It is no answer to this position to say that he was not a party to the action for the injunction. He, as well as the whole public, was represented by the supervisor of roads, and is bound by the decree. Besides it appears that he had actual notice of the pendency of the action, and the evidence pretty conclusively shows that he caused a notice to be served on Cooper to open the road through his land: The road supervisor was

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the representative of the public, and the only person authorized by law to open the road, and the injunction is a complete bar to any further proceedings involving the validity of the road. The plaintiff's obligation was to procure the establishment of the road, not subject to be defeated by any legal proceeding, either by injunction or *certiorari*. It having been judicially determined that the road cannot be opened, we think the defendant should not be required to pay the consideration he agreed to pay therefor.

AFFIRMED.

ADAMS, J., dissenting.—I think that the evidence shows that the plaintiff procured the establishment of a road according to his agreement. It is true the auditor erred in appointing for final hearing a day ninety-one days distant. But his action was not, I think, for that reason void. He had acquired jurisdiction to appoint the day, and the most, I think, that can be said is that his action by reason of the error in appointing the wrong day was subject to be annulled upon *certiorari*. If I am correct in this, it follows that the action not being annulled, the road became a legal road. After the lapse of twelve months, the time within which a writ of *certiorari* could issue, the error was wholly immaterial. If, at that point of time, this action had been brought, the defendant could not have successfully maintained that the plaintiff had not procured the establishment of the road; there was, then, a point of time when the plaintiff had performed his agreement. It did not become unperformed by what afterwards transpired, nor did the plaintiff become estopped from saying that he had performed his agreement. The action for an injunction brought by Cooper against Ramsey did not have that effect, because the plaintiff Dicken was not a party to it.

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FORSYTHE v. McMURTRY ET AL.

1. Practice: DISMISSAL OF ACTION: STATUTE CONSTRUED. Sections 2844 and 2845 of the Code of 1873 apply equally to actions at law and suits in equity, and thereunder it is not competent for the court, on its own motion, to dismiss a cause in equity without prejudice, after it has been finally submitted on the evidence. In such case the defendant is entitled to a decision upon the merits, so that the judgment may bar another action for the same cause. BECK, J., dissenting.

Appeal from Decatur Circuit Court.

THURSDAY, JULY 13.

ACTION for the partition of real estate. The plaintiff claimed to own the undivided one-sixth part thereof. This was denied by the defendants. Upon the issue thus joined there was a trial to the court, and from the judgment the defendants appeal.

Harvey & Young, for appellants.

No appearance for appellee.

SEEVERS, CH. J.—This cause was submitted to the court upon the pleadings and evidence introduced by the plaintiff and it was taken under advisement. Afterward there was entered the following decree. “The court finds that plaintiff has failed to prove title in said cause and dismisses said cause, without prejudice, at plaintiff’s costs.” We understand this to mean that plaintiff had failed to establish that he owned any portion of the land in controversy, and the court therefore, that is because of a failure of proof, dismissed the action without prejudice to the right of the plaintiff to bring another suit. To this the defendant excepted. The only question we are required to determine is whether the court after the final submission of an equity cause has the power to dismiss the same without prejudice—that is so that an action

Perrythe v. McMurtu.

which has been so submitted will not bar another action brought to recover the same thing.

The statute provides: "An action may be dismissed and such dismissal shall be without prejudice to a future action:

1. By the plaintiff before the final submission of the case to the jury, or to the court, when the trial is by the court.
2. By the court when the plaintiff fails to appear when the case is called for trial.
3. By the court for want of necessary parties, when not made according to the requirement of the court.
4. By the court on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.
5. By the court for disobedience by the party of an order concerning the pleadings or any proceedings in the action. In all other cases upon the trial of the action the decision must be upon the merits. Code §§ 2844, 2845.

It is clear the ruling of the court cannot be sustained under the statute, for the reason the statute does not contemplate that the court, on its own motion, can dismiss a cause without prejudice, after it has been finally submitted. When evidence has been introduced and the cause is submitted to the court, the decision must be on the merits. A decision on the merits is a final disposition of the cause and constitutes a bar to another action. That this is so at law will probably be conceded. Now is there one rule of practice in actions at law and another in equity causes?

All forms of actions are abolished and proceedings in a civil action must be either at law or chancery. Code, § 2507. The practice in each is prescribed by statute and when no exception is made the provisions of the statute apply equally to both. Sections 2844 and 2845 of the Code must apply to both actions at law and in equity, for clearly neither is excepted. This being so there would be the same propriety in saying they applied solely to equity as there is to say they affect actions at law alone.

Forsythe v. McMurry.

We have examined the evidence and find the court found correctly, that the plaintiff failed to establish any title to the premises in controversy, and therefore the defendants were entitled to a decision on the merits. The court erred in dismissing the action without prejudice.

REVERSED.

BECK, J., dissenting.—The petition in this case alleges that plaintiff is the owner of an undivided one-sixth of three tracts of land which, under the statute, he inherited from his deceased wife, who inherited from her father, Joshua McMurry, an undivided one-third of the same lands. Attached to the petition is an abstract of the title appearing of record, which shows that Joshua McMurry entered two of the tracts, and John McMurry entered the other. The defendants in their answer deny all the allegations of the petition. The cause, upon the order of the court, was tried upon written testimony, and after the proof had been submitted the court took the case under advisement. John McMurry, brother of Joshua, testified that the tract of land, the patent for which was issued in his name, was intended for Joshua, who furnished the money to make the entry, and that he, with his wife, subsequently conveyed the land to Joshua. There is evidence showing the death of Joshua, the death of plaintiff's wife, that she was a daughter of Joshua, and other facts establishing title in plaintiff to the one-sixth of the land, if the title thereof was in Joshua. But the record fails to show that the title deeds and patents of the land were offered in evidence. The court finding upon the evidence that plaintiff had failed to establish title to the land, dismissed the petition without prejudice. We are authorized to infer that the failure occurred through oversight and that the court was satisfied plaintiff held a valid title or an equity in the land.

Courts of chancery will dismiss a bill without prejudice when there is "a slip or mistake in the pleadings or in the proof," and for like causes. 2 Daniels Ch. Plead. and Prac.,

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p. 994. In my opinion under this familiar rule prevailing in equity, the Circuit Court rightly dismissed plaintiff's bill without prejudice to his right to prosecute another action.

The foregoing opinion of the majority of the court is based upon the statutes therein cited. In my judgment these statutes are not intended to limit the power of the court of chancery to grant the relief to which the plaintiff, under the rules prevailing in that forum, is entitled. And I think when, under the rules of equity, it appears that plaintiff has the right to the dismissal of his action without prejudice, these statutes do not cut off that right, which pertains to the *relief*, not to the *form* of proceedings.

The statute (Code, § 2507), abolishes all distinction pertaining to the *forms* of actions. This does not reach rights and remedies. They exist unchanged as prescribed by the rules of equity. As we have seen equity declares that in a case of this character the plaintiff's bill shall be dismissed without prejudice. Sections 2844 and 2845 must, therefore, be understood as applicable alone to actions at law. If they be held applicable to actions in chancery it follows that the powers of the court of equity is thereby abridged and familiar relief granted in that forum, to attain the ends of justice, is prohibited. But this is not the purpose and spirit of the provision of the chapter of the Code wherein the sections relied upon by the majority of the court are found.

In my opinion the judgment of the Circuit Court ought to be affirmed.

Beeson v. Johns.

BEESON ET AL. V. JOHNS ET AL.

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1. **Taxation: Assessment of Land: Viewing the Property: Statute Construed.** Under section 720 of the Revision (Code, Sec. 812) it is not necessary to the validity of an assessment of real property that the assessor shall personally examine the land.
 2. **— : — : Correction by Auditor: Burden of Proof.** In an action to set aside a tax deed, where in the description of the land on the assessment roll as returned by the assessor, the letters "SW" have been changed to "NE," and there is evidence tending to show that the change was made with authority by the deputy auditor (Rev. 747), and the roll so changed has been regarded as correct in all subsequent records and proceedings, including the sale of the land for taxes, the burden of proof is upon the plaintiff, whose duty it was to see that the land was properly assessed, to show that the assessment as shown by the changed roll was unauthorized and void.
 3. **Tax Sale: Fraud: Evidence.** Proof that there were three bidders at a tax sale, and that they did not bid one against another, is not sufficient evidence to establish a fraudulent combination among them.
 4. **Taxation: Unequal: Residents and Non-Residents.** Where no fraud is shown, and it appears only that improved lands were not assessed as high in proportion as unimproved, but that no discrimination was made between the unimproved lands of residents and non-residents, the assessment was not void, under the ordinance of 1787, or the act of Congress admitting the State of Iowa into the Union. DAY, J., *dissenting in part*, basing his opinion on his view of the facts.

Appeal from Grundy Circuit Court.

THURSDAY, JULY 13.

THE plaintiffs, claiming to be the owners of certain real estate, brought this action to set aside a tax title to the same on the grounds: "*First*, that there was no assessment; *Second*, that there was a fraudulent combination among the purchasers at the tax sale; *Third*, that there was no assessment to the unknown owners in tracts of forty acres corresponding to the smallest government subdivisions as required by law; and *Fourth*, that the owners being non-residents of the State the assessment was at a greater value than the property of

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residents. There was a trial to the court and the petition dismissed. The plaintiffs appeal.

Alford & Gates, for appellants.

W. V. Allen, for appellees.

SEEVERS, CH. J.—I. Eighty acres of the land in controversy is in section 29, township 97, range 15. The owners be-

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viewing the
property:
statute. ing unknown the land in said section was assessed to the unknown owners in quarter-section tracts, the value being fixed at four dollars per acre.

When the assessment was returned to the board of supervisors it was rejected by the board and the assessor directed to assess the same in forty acre tracts. This he did, and made return thereof to the board, and on such assessment the taxes were levied. The second assessment was made by fixing the value of each forty acre tract at the same value per acre as had been done at the first assessment. There was no new examination made, and in fact the assessor did not at any time personally examine the land. It is said such assessment is void because the statute then in force required the assessment to be made at the cash value of the land, having due regard to its quality, location, natural advantages and other elements of value. Rev., § 720. The argument is that the assessor could not comply with the requirements of the statute unless he examined the land and determined its value in accordance with the requirements of the statute. It may be the assessment was irregular but we do not believe it was void. A literal compliance with the statute, if a personal examination of each forty acre tract is required would necessitate that the corners and boundaries thereof should be ascertained. The aid of a surveyor would be necessary, and this would require more time than the assessor is allowed by law to complete the assessment. We do not believe the assessor is required to personally examine each forty acre tract, but of necessity he must arrive at the value from in-

Besson v. Johns.

formation derived from others, having regard, however, to the elements of value prescribed by statute. If he makes mistakes in this respect, as he may do, ample opportunity is given the owner to have the same corrected.

One forty acre tract of the land in controversy is the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 31, township 87, north of range 15, west.

The whole northeast quarter was omitted by the assessor and not assessed by him. When he made the second assessment and returned the roll to the board of supervisors there was contained therein the following: "NW, SW 31, 87, 15, 48 30-100 acres." The number of acres was correctly stated. At some time, and by some person, after the assessment roll had been returned to the board of supervisors, there was written with a pencil over the letters "SW" the letters "NE" so that thereafter the land assessed appeared on the roll to be in the northeast quarter instead of the southwest quarter as returned by the assessor. No change was made in the value fixed by the assessor. The statute in force at the time the assessment was returned authorized the auditor to "correct any clerical or other error in the assessment or tax book." Rev., § 747. The auditor testified he believed the alteration or correction in the assessment had been made by his deputy. It is true, his evidence is not of a certain or decided character, but there is nothing contradictory thereto. The assessment roll, as corrected, has been at all times on file in the auditor's office and the land was described in the tax books and sold as described in the corrected assessment roll. There is no evidence tending to show the land was assessed or taxed more than once. Under the circumstances we are forced to conclude the correction was made by the deputy auditor. That he was authorized to do so there is no doubt. The fact that the roll as corrected has remained on file as a record in the auditor's office, and that it has been regarded in the subsequent proceedings as correct, casts upon appellants the burden of showing that it

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was incorrect and that the taxes assessed on the land were inequitable or unjust. This they have failed to do. Besides this, it was the duty of the owner to see that this land was properly assessed, and the statute then in force provided that no error or irregularity in the assessment shall render the taxes invalid or affect the title of anyone claiming under a tax deed. It may be conceded the corrected assessment was irregular. It was not, we think, void.

II. There were three bidders at the tax sale and they did not bid against each other, and this constitutes the only evidence there was of a fraudulent combination. We feel constrained to say this evidence is not, in our opinion, sufficient. Fraud cannot be presumed, but the contrary presumption must be indulged in the absence of evidence. It might well be that each bidder obtained all the land he wanted without the necessity of bidding against anyone else.

III. Conceding the land in controversy belonged to non-residents and that it was assessed at a greater value than similar land belonging to residents, is the tax title void under the ordinance of 1787, or the act of Congress admitting the State of Iowa into the Union? We are not prepared to say if such an assessment was objected to at the proper time and manner it could be sustained; but we do not believe, under the facts in this case, the title of the purchaser at the tax sale, by reason thereof, is void. The authorities cited by counsel for the appellant do not go to this extent. Fraud is not alleged or shown, nor is it claimed there was an actual intent to discriminate against non-residents. At most, it appears the improved lands of residents were not assessed as high, in proportion, as the unimproved lands. No discrimination was made between the unimproved lands of residents and non-residents. For aught that appears, the relative value of the improved and unimproved lands was erroneous only. Under such circumstances a correction or abatement should have been applied for as

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provided for by law. The assessment and levy were not void and for the correction of the error, the remedy provided by law is ample for the complete protection of the tax payer. Cooley on Taxation, 528.

AFFIRMED.

DAY, J., dissenting. I cannot concur in so much of the foregoing opinion as pertains to the NW NE, 31, 87, 15. The evidence shows that the assessor made two assessments. In the first assessment the lands of unknown owners were assessed in tracts of 160 acres. In this assessment the whole of the NE $\frac{1}{4}$ of section 31, 87, 15, was omitted. The assessor was then directed to re-assess the lands of unknown owners in tracts of forty acres. He made a re-assessment in tracts of forty acres in which also the whole of the NE $\frac{1}{4}$ of section 31, 87, 15, was omitted. In this assessment the following appeared: "NW, SW, 31, 87, 15, number of acres 48.30, value per acre \$4, total valuation \$192.70." Over the letters "SW" there is now written in pencil the letters "NE." The evidence does not show when this was done. Mr. Willoughby, who was county auditor in 1869, expresses the opinion that it was done in July, 1869, and that the letters are in the handwriting of his deputy. That the assessor in fact assessed the NW, SW and the change was not made to correct a mistake in the work of the assessor is evident from the fact that the whole of the NE $\frac{1}{4}$ of section 31 was omitted from the assessment, and from the further fact that the number of acres attached 48.30, is fractional. The evidence shows that the NW, SW is fractional, but that the NW NE is not. Besides, if this assessment is treated as an assessment of the NW, NE then the NW, SW is left without assessment. It is not competent for the deputy auditor thus to shift an assessment from one tract to another. Mr. Willoughby, the county auditor, testified as follows: "We, my deputy and I, corrected together the most of the assessor's books, part of, not all * * *. Sometimes when we found that the assessor had not properly described the tract of land,

First National Bank of Garrettsville v. Green.

we corrected the description, and sometimes we did not * *. So far as this land is concerned we did not, from the fact that it is entered here as fractional, when the NE $\frac{1}{4}$ is not fractional." It is very clear to me that the writing in pencil, if done by the deputy auditor, did not correct a clerical or other error of the assessor. The error of the assessor was in omitting from assessment the whole of the NE $\frac{1}{4}$ of section 31. This error could not be corrected by changing the NW, SW of section 31 to the NW, NE of section 31. The only effect of this would be to include a part of the NE and exclude an equal part of the SW. In my opinion there never was any assessment of the NW, NE section 31, and as to it the judgment of the court below should be reversed.

FIRST NATIONAL BANK OF GARRETSVILLE, OHIO, v. GREEN.

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111	170
59	171
136	718

1. **Jurisdiction:** CIRCUIT COURT: DEMURRER. Where an action against an administrator, which might have been brought in probate, is in fact brought in the Circuit Court as an action at law, the court has jurisdiction, and a demurrer will not lie. The remedy of the defendant is to move the court to transfer the cause to the probate docket. *Ashlock v. Sherman*, 56 Iowa, 811, followed. *Hutton v. Laws*, 55 Iowa, 710, distinguished.

Appeal from Linn Circuit Court.

THURSDAY, JULY 13.

THE petition states plaintiff recovered a judgment against the Burlington, Cedar Rapids and Minnesota Railway Company which remains wholly unpaid. That an execution issued on said judgment and the sheriff was unable to find any property on which to levy, whereupon demand was made on the officers of said company to point out property belonging to the company upon which the execution could be levied, but said officers failed and refused to do so. That defendant's

First National Bank of Garrettsville v. Green.

intestate, George Green, was the owner of a large number of shares of stock in the company, but that he had never paid therefor. The object of the action is to compel the estate of George Green to pay for said stock and that the same be applied in satisfaction of the amount due the plaintiff. The relief asked in the petition is as follows: "Plaintiff therefore prays judgment * * * as claimed, the same to be allowed by the court as a claim against said estate." The petition was duly verified. The defendant demurred thereto on the ground: "The supposed cause of action in said petition set forth is a claim against the estate of George Green, deceased, in probate and no action at law can be maintained thereon." The demurrer was sustained and plaintiff appeals.

P. Henry Smythe & Son, for appellant.

Hubbard, Clark & Dawley, for appellee.

SEEVERS, CH. J.—I. The ground of demurrer to the petition is that the action is at law and that it should have been brought in the Probate Court. The Circuit Court has common law jurisdiction and also sits as a Probate Court. The action was therefore brought before the right judge and in the right court, but the complaint is that it was not entitled and brought as an action or claim in probate. In *Ashlock v. Sherman*, 56 Iowa, 311, it was held, such question could not be raised by demurrer, but that the only remedy was to move the court to transfer the cause to the proper docket. Following that case this cause must be reversed.

It is said by counsel that there is a conflict between the case cited and *Hutton v. Laws*, 55 Iowa, 710; but we do not think this is so. Had a motion to transfer this cause been made and sustained the effect would have been precisely the same as the action of the court in *Hutton v. Laws*. In that case the court on its own motion directed the administrator to account to the Probate Court. This amounted

Van Vechten v. Smith.

to a transfer of so much of the cause to that court. The action did not abate, but remained pending in the proper court.

The effect of sustaining the demurrer in this case would be to abate the action and compel the plaintiff to commence anew. Counsel for the appellee insist the action is not against William Green *as* administrator, but against him personally, and therefore the demurrer was properly sustained. It is sufficient to say no such point is made in the demurrer. Had it been the plaintiff could have amended its petition, if so advised, in the Circuit Court. The point cannot be raised for the first time in this court.

REVERSED.

VAN VECHTEN v. SMITH.

59	173
112	637
59	173
113	501
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128	226
59	173
137	303
59	173
140	423

1. **Instruction: ISSUE NOT SUPPORTED BY EVIDENCE.** When an issue is tendered by answer, but not supported by any evidence, the defendant cannot be prejudiced by the failure of the court to submit that issue in his instructions to the jury.
2. **Evidence: PROMISSORY NOTE: FRAUD: STATEMENT OF VENDOR.** A statement not amounting to a warranty, made by the vendor as to the value of the property sold, is to be treated as a mere opinion; and even if such statement is false and intended to deceive, that fact will not defeat recovery upon a note given for the property.
3. — : — : — : **COLLATERAL AGREEMENT.** Where defendant gave his note to plaintiff for two shares of stock, and at the same time gave plaintiff six dollars for which he took plaintiff's due bill for certain property, *held* that plaintiff's failure to deliver the property named in the due bill was not such a fraud as to avoid a recovery on the note.
4. **Contract: RESCISSION: EVIDENCE EXCLUDED.** A party cannot rescind a contract without surrendering, or offering to surrender, all that he has received under such contract; and it was *held* not error in this case for the court to exclude evidence offered by the defendant that he had surrendered the stock, when there was no pretence that he had surrendered, or offered to surrender, the due bill.
5. **Evidence: PROMISSORY NOTE: PAROL NOT ADMISSIBLE.** Parol testimony that a promissory note was to be paid only out of commissions to be earned by the payer as agent of the payee, *held* not admissible to contravene the terms of the note in a suit thereon.

Van Vechten v. Smith.

6. **Agency : to collect note: authority limited.** An agent authorized to collect a note cannot bind his principal by an expression of his opinion as to the reading of a doubtful word in the note.
7. **Evidence : admission of: error without prejudice.** When plaintiff had shown by undisputed evidence and without objection that an interlineation was made before he purchased the note, defendant was not prejudiced by the admission of other evidence that the interlineation was in the note soon after plaintiff purchased it, though such evidence was immaterial.

Appeal from Jones Circuit Court.

THURSDAY, JULY 13.

ACTION upon a promissory note executed by the defendant to the Iowa Iron and Steel Fence Co. of Cedar Rapids, and sold and indorsed by the company to the plaintiff. The copy set out by the plaintiff in his amended petition is in these words:

"MONTICELLO TOWNSHIP, JONES COUNTY, IOWA. }
"JULY 25, 1877. }

"One year after date I promise to pay to the treasurer of the Iowa Iron and Steel Fence Co. of Cedar Rapids, or bank, \$200 at the City National Bank of Cedar Rapids, Iowa, value received, with interest at ten per cent from date. Reasonable attorney's fee if suit be instituted on this note.

"signed,

"HENRY D. SMITH."

The defendant for answer avers that the copy set out is not a true copy; that while it is true as shown, that the note at the time it was executed contained no words of negotiability, it does now contain such words; that instead of the word "bank" as contained in the copy after the word "or," there is in the note the word *bearer* after the word "or;" that the word *bearer* was interlined after the note was signed and delivered; and that by the interlineation of the word the note was materially altered. The defendant further avers that the note was fraudulently obtained, and is without consideration. There was a trial to a jury and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Van Vechten v. Smith.

Sheean & McCarn, for appellant.

McCrary & Barber and *Remley & Ercanbrack*, for appellee.

ADAMS, J.—I. The court instructed the jury in substance that if they should find that the word *bearer* was interlined after the delivery of the note, that would be a material alteration and vitiate the note; but if by evidence. they should find that the word *bearer* was interlined at, or before delivery, the note would be negotiable, and the plaintiff would be entitled to recover, even though they found that the note was procured by fraud and without consideration. The defendant contends that the court erred in the last part of the instruction, because both the plaintiff and defendant aver in substance that the note is not negotiable, and the court should not have instructed the jury upon the theory that they were at liberty to find that it is.

It will be seen that the plaintiff's theory that the note is not negotiable rests merely upon the fact that he reads the disputed word as *bank* and not as *bearer*. The defendant's theory that the note is not negotiable rests upon the theory that the disputed word was not in the note at the time it was delivered.

The disputed word, we judge from the evidence, is very nearly illegible. If the word is *bank* it is immaterial when it was written, because the legal effect of the instrument is the same with it as without it. *Granite Railway Co. v. Bacon*, 15 Pick., 239. But if the word is *bank* as plaintiff assumed and averred, he took the note subject to all defenses.

The defendant insists that whether the word is *bank* or *bearer* the plaintiff took the note subject to all defenses, and for the reason that the plaintiff avers that the word is *bank*. We do not feel called upon to go into any inquiry as to the correctness of this position. We do not think that the defendant was prejudiced by the instruction, even if it was erroneous. The defendant does not complain that the issue

Van Vechten v. Smith.

tendered by him by his averment that the word in dispute is *bearer* and was interlined after delivery, was not properly submitted. He had the full benefit of that defense. His complaint is that his defense of fraud and want of consideration was not properly submitted. His theory is that the jury may have found that the word in dispute is *bearer* and was interlined at, or before delivery, and having so found felt precluded from going into the consideration of the defense of fraud and want of consideration. But the defendant was not prejudiced unless there was some evidence of fraud or of a want of consideration, and we have to say that we fail to discover any.

The defendant avers, and the undisputed evidence shows, that the note was given for two shares of stock in the Iowa ^{2. EVIDENCE:} Iron and Steel Fence Co. of Cedar Rapids. The <sup>promissory
no. e: fraud;
statement of
vendor.</sup> averment of fraud consists simply in this: that the agent of the company who negotiated for the company the transaction, by which the defendant took two shares of stock in the company, and gave his note therefor, represented to the defendant that the stock was valuable, whereas, it was in fact, worthless.

But the doctrine is elementary that under ordinary circumstances a statement by a seller of property that it is valuable is to be treated as a mere opinion, and not as a false representation, however insincere the seller may have been in his statement. In *Brown v. Castles*, 11 Cush., 350, Metcalf, J., after stating the rule that where a seller makes a known misrepresentation of a material fact, not within the observation of the buyer, an action will lie, says: "This rule is not applied to statements made by sellers concerning the value of the thing sold, it always being understood the world over that such statements are to be distrusted." So again in *Manning v. Albe*, 11 Allen, 522, Gray, J., said: "This court has repeatedly recognized and acted upon the rule of the common law by which the mere statements of a vendor, either of real or personal property, not being in the form of a warranty, as to

Van Vechten v. Smith.

its value, are assumed to be so commonly made by those holding property for sale, in order to enhance its price, that any purchaser who confides in them is considered too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive." We see nothing in the case before us to justify us in holding that the rule above enunciated is not applicable.

As a further conclusive answer to the defendant's position, we may say that we see no evidence showing, or tending to show, that the stock was not in fact valuable, as the company's agent is alleged to have stated. On the other hand, the defendant testifies that he knows nothing about the stock.

There is evidence that the defendant paid the company six dollars, and that in consideration thereof the company was to send him six dollars worth of fencing material,
~~a. — : — : collat-~~ which it failed to do. For the six dollars the company gave the defendant its due bill, payable in fencing material. The defendant, if we understand him, relies upon the failure of the company to send him the fencing material as constituting a fraud sufficient to avoid the note sued on.

But the most that can be said is that the failure to send the fencing material has given the defendant a right of action upon the due bill which he holds for the fencing material. A mere failure to perform an agreement never constitutes fraud.

II. The defendant averred in his answer that he returned the stock to the company. Upon the trial he offered to prove the truth of this allegation, and the court refused to allow him to do so. He claims that the payment of the six dollars, the taking of the company's due bill for that amount of fencing material, the taking of two shares of stock in the company, and giving his note therefor, constituted altogether one transaction; that when the company failed to send the fencing material he had a right to rescind his agreement to take the stock, and did re-

Van Vechten v. Smith.

scind it, and should have been allowed to prove that he returned the stock.

If the several matters above set out constituted one transaction, as the defendant claims, he could not rescind without surrendering, or offering to surrender, the due bill, and there is no pretense that he did either.

III. At the time the stock was taken by the defendant, and the note sued on was given therefor, the defendant was

^{5. EVIDENCE:} appointed the agent of the company to sell fencing material within his township. The six dollars worth of fencing material which his due bill called for, was to be sent him as a sample and to be used as such. The defendant claims that he expected that his commissions on sales would be sufficient to meet the note, and that he was not to pay it except from such commissions, which commissions he has failed to make because he had no sample fence. The defendant, when examined as a witness upon the stand, testified in substance that the agreement was that he was to pay the note from commissions and not otherwise. Afterward, upon the motion of the plaintiff the defendant's testimony in respect to such agreement was stricken out. The defendant assigns the ruling as error.

It may be that the agreement in respect to the payment of the note was what the defendant alleges it was, and that the defendant will suffer a hardship in not being allowed to show it. But it will be seen at once that what he proposed to do was to show an agreement by parol which contravened, so far as it was of any value to the defendant, the terms of the note.

IV. We are unable to see that the defendant has any valid defense unless the disputed word in the note is *bearer*,
^{6. AGENCY: to collect note: authority limited.} and was interlined after delivery. For the purpose of showing that the word is *bearer* he offered to testify that one Bennett said that it was *bearer*, and that Bennett was acting as the agent of the plaintiff in

Hanks, Adm'r, v. Van Garder.

trying to collect the note. The court ruled that such evidence was inadmissible and the defendant assigns the ruling as error. Bennett's authority to collect the note was not authority to read the note and bind the plaintiff by his reading.

V. The plaintiff was allowed to show, against the objection of the defendant, by one C. D. Van Vechten that he saw

7. **EVIDENCE:** the note soon after the plaintiff purchased it, and **admission of:** soon after it was made, and that the note has not **error without:** prejudice been altered since that time. It appears that this evidence was immaterial, but we think that the defendant was not prejudiced. It was shown by other evidence and without objection that the interlineation was made before the plaintiff purchased the note, and the evidence upon that point is undisputed.

The views which we have expressed cover, we think, substantially all the errors assigned, and we have to say that we think the judgment of the District Court must be

AFFIRMED.

HANKS, ADM'R, v. VAN GAEDER.

59 179
111 462
59 179
e129 492

1. **Practice in Supreme Court: TRIAL DE NOVO: OBJECTIONS TO EVIDENCE.** In the trial of a cause *de novo* the Supreme Court will not consider objections to the admission of testimony made in the court below.
2. ——: **MOTION TO SUPPRESS DEPOSITION NOT ENLARGED.** When a motion is made by plaintiff in the court below to suppress *one* part of a deposition on *one* ground, he cannot under cover of that motion be heard to argue in the appellate court that *another* part of the deposition was inadmissible and should have been suppressed on *another* ground.
3. ——: **MOTION NOT RULED ON DEEMED WAIVED.** When a motion to exclude testimony or to suppress a deposition is made in the court below, but does not appear to have been ruled on, the appellate court will deem the motion to have been waived.
4. **Evidence: HUSBAND AND WIFE: PROHIBITED COMMUNICATION.** The widow of the intestate testified to the transfer of a claim to her by her husband before his death: *held* not incompetent as disclosing a communication between husband and wife.

Hanks, Adm'r, v. Van Garder.

Appeal from Allamakee District Court.

THURSDAY, JULY 13.

ACTION to foreclose a chattel mortgage. The plaintiff, as administrator of the estate of J. C. Cayton, deceased, holds a promissory note drawn for \$986.73, executed by the defendant to the plaintiff's intestate, and secured by a mortgage on certain stock, grain and farming machinery, and which is the mortgage now sought to be foreclosed. The defendant for answer avers that the note and mortgage were given solely to indemnify the plaintiff's intestate against certain liabilities incurred for him in becoming his surety for indebtedness; and that the liabilities have now been discharged so far as the estate of the plaintiff's intestate is concerned. The court found the allegations of the defendant's answer to be true and dismissed the plaintiff's petition. He appeals.

Burling & Stowe, for appellant.

A. S. Powers, for appellee.

ADAMS, J.—The plaintiff insists that a portion of the evidence was wrongly admitted. But the case is triable *de novo*, and we have only to inquire whether the evidence which was properly admitted is sufficient to maintain the defense. The note and mortgage were given in March, 1878. One A. B. Cayton testified that in the winter of 1879 and 1880 he heard the intestate say that he had a mortgage on stock and machinery given him by Van Garder to secure him for signing as surety to one J. N. Smith, one P. W. McLelland and one Nathan Lamborn. It is not shown that more than one mortgage was executed by the defendant to the intestate upon stock and machinery. We think, therefore, that the reasonable inference is that the mortgage referred to by the intestate was the one now in suit.

1. PRACTICE
in supreme
court : trial
de novo : ob-
jection to
testimony.

Hanks, Adm'r, v. Van Garder.

We come next to inquire whether the indebtedness due Smith, McLelland and Lamborn respectively, has been paid. The Lamborn indebtedness the defendant testifies that he paid himself. The plaintiff insists in argument that the defendant was incompetent to testify to such fact as against the plaintiff as administrator. But while the plaintiff moved to suppress a part of the deposition he did not move to suppress this part, and did not move to suppress any part on the ground that the defendant was incompetent to testify against the plaintiff as administrator. On the reading of the deposition he objected to the part above set out, but only on the ground that it was irrelevant and immaterial, and such objection it is manifest was not well taken.

As to the payment of the Smith notes the defendant testified as follows: "Int. 9. Have you the notes? If so produce them. Ans. I have not got them; Cayton had them; I gave him some other notes in payment and he then assumed the payment of the Smith notes and took them up." The plaintiff moved to exclude this testimony as not responsive, but the motion does not appear to have been waived. ruled upon and the ruling therefore must be deemed to have been waived.

As to the McLelland indebtedness the defendant testified as follows: "It was put in judgment and the judgment was paid or purchased by Cayton." The plaintiff objected to this testimony as irrelevant and immaterial and incompetent, as seeking to disclose a personal transaction with the decedent. In our opinion the objection was not well taken.

We have only to inquire whether anything is due to the intestate's estate by reason of the payments which the intestate made. We have already set out some evidence tending to show that the defendant gave the intestate notes by reason of which the intestate assumed the payment of the Smith notes. But he further testified, and as it appears without objection, when asked whether he had paid the Smith notes

Schultz, Adm'r, v. Cremer.

upon which Cayton was surety, that he did by giving a mortgage and notes against one Mrs. C. Martin. As to the McLelland indebtedness Mrs. Cayton testified as follows: "Int. Does the estate of James C. Cayton now hold the claim against Van Garder on the McLelland note or judgment? Ans. No; it is my claim; it was assigned to me by Cayton before he died." This was objected to as irrelevant, immaterial and incompetent, as seeking to disclose a communication from husband to wife.

4. EVIDENCE: husband and wife : prohibited communication. In our opinion the objection was not well taken. The transfer of a claim is not a communication, we think, within the meaning of the statute. Before the deposition of Mrs. Cayton was read, the plaintiff filed a motion to suppress it on the ground that the witness was the widow of the intestate and interested in the estate. The motion does not appear to have been ruled on and must be deemed to have been waived.

In our opinion the plaintiff's petition was rightly dismissed.

AFFIRMED.

59	189
78	650
59	183
80	541
59	182
95	601

SCHULTZ, ADM'R, v. CREMER.

1. **Practice: VERDICT: STATUTE CONSTRUED.** Under section 2808 of the Code, the jury, in their discretion, may render a general or special verdict; but it is error for the court, against the defendant's objections, to direct the jury to render a special verdict only.

Appeal from Winneshiek Circuit Court.

THURSDAY, JULY 13.

ACTION for damages for the alleged wrongful conversion of the property of the estate of plaintiff's intestate. The defendant pleaded a general denial. There was a trial to a jury, and a special but not a general verdict. The court rendered judgment for the plaintiff. The defendant appeals.

Schultz, Adm'r, v. Cremer.

L. Bullis, for appellant.

Brown & Wellington, for appellee.

ADAMS, J.—The record in this case is somewhat obscure, but we infer from it in connection with what seems to be claimed and conceded by counsel, that the court directed the jury against the objection of the defendant to return only a special verdict.

A jury may in their discretion render a general or special verdict. Code, § 2808. They may also where they render a general verdict be required to render a special verdict in addition. See section above cited. The language is: "In any case in which they (the jury) render a general verdict, they may be required by the court * * * to find specially upon any particular question of fact to be stated to them in writing." The statute does not authorize the court to require a special verdict, except in addition to a general verdict. The rendition of a special verdict, without a general verdict, is left solely to the discretion of the jury.

The design doubtless was to provide for a case where the jury, after having determined the controlling facts in the case, do not feel fully assured as to the general conclusion which under the law should be drawn from the facts. But it appears to us that every party has a right to a general verdict if he demands it and the jury sees fit to render it. To hold that the court may direct otherwise, would, it appears to us, be adopting a rule for which the statute affords no warrant. It would indeed take from the jury a discretion which the statute expressly confers. Why such discretion is conferred, it is not important to inquire. We can conceive that the legislature considered that it was proper that the jury should, in every case, be allowed to contemplate the general result.

We think that the court erred in directing the jury against the defendant's objection to render a special verdict only.

REVERSED.

HOYT v. BLACK HAWK COUNTY.

1. **Pauper: IN CITY: WHO MAY ORDER AID FOR: STATUTE CONSTRUED.**

When, under section 1361 of the Code, the board of supervisors has appointed an overseer of the poor for a city, such overseer has exclusive control of the poor of such city, and the township trustees have exclusive control of the poor in the township outside of the city, and in such case the county is not liable for aid rendered a city pauper on the order of the township trustees.

Appeal from Black Hawk District Court.

THURSDAY, JULY 13.

ACTION to recover for relief furnished to a pauper, one Mary J. Hays. The question presented in this case arises upon the construction of Sec. 1361 of the Code. The pauper resided within the limits of Waterloo, a city of the second class. The board of supervisors had appointed for the city an overseer of the poor. Application was made to him to provide relief for the pauper without her being sent to the county poor house, which he refused to do. Application was then made to the trustees of Waterloo township, being the township which embraces that part of the city of Waterloo in which the pauper resided. They determined that the pauper was entitled to relief, and was such a person as should not be sent to the county poor house. They accordingly directed the plaintiff to furnish her certain relief. The plaintiff presented his bill duly certified to the board of supervisors, which they refused to pay. The action is brought upon such bill. There was a trial without a jury and judgment was rendered for the plaintiff. The defendant appeals.

M. T. Owens, for appellant.

Boies & Couch, for appellees.

ADAMS, J.—The defendant claims that the township trustees upon whose order the relief was furnished had no jurisdiction in the premises. Its position is that when the board

Hoyt v. Black Hawk County.

of supervisors appointed an overseer of the poor of the city, it excluded the jurisdiction of the township trustees in relation to such poor.

That portion of the statute upon which the question arises is in these words: "Where a city of the first or second class

* * * is embraced within the limit of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city all the powers and duties conferred by this chapter on the township trustees." The question presented is as to whether the city overseer is to be deemed to have exclusive control of the city poor, or whether his power is to be exercised concurrently with that of the township trustees, either having the power to provide relief whenever the occasion should seem to require. In our opinion the power conferred upon the city overseer is exclusive. That of the trustees is exclusive in the township outside of the city, and that is expressly made the measure of the overseer's power within the city. The language used is "all the powers and duties conferred," etc. In our opinion as the relief furnished was not furnished upon the order of the city overseer, the plaintiff cannot recover.

REVERSED.

Milne v. Walker.

59	186
79	419
59	186
80	463
59	186
83	353
59	186
81	54
59	186
88	619
59	186
89	147
59	186
94	364
59	186
97	656
59	186
127	23

MILNE V. WALKER.

1. **Instruction: ORDER TO FIND FOR DEFENDANT: ERROR WITHOUT PREJUDICE.** An order by the court to the jury to bring in a verdict for the defendant is not an "instruction" in contemplation of the statute requiring instructions to be in writing, and the fact that such order was given orally was, at the most, error without prejudice.
2. **Negligence: CONTRIBUTORY: LAW AND FACT.** If there are no complicating circumstances, and if the undisputed facts are such that a reasonable mind can draw no other conclusion than that the plaintiff was in fault, it is the province of the court to determine the question as one of law, and it may properly order the jury to return a verdict for the defendant.

Appeal from Fayette District Court.

THURSDAY, JULY 13.

THE plaintiff claims damages of the defendant and for cause of such claim alleges that the defendant so negligently tied a certain stallion of the defendant in plaintiff's barn, and with such a weak and insufficient halter that the stallion broke loose and injured a horse of the plaintiff, standing in a stall in said barn by breaking his leg. He avers that the damage was caused by the negligence of the defendant and without fault or negligence on his part.

There was a trial by jury, and a verdict and judgment for defendant. Plaintiff appeals.

Ainsworth & Hobson and Hoyt & Hancock, for appellant.

D. W. Clements and A. S. Hallembæk, for appellee.

ROTHROCK, J.—I. After the plaintiff had introduced his evidence and rested his case, the court made the following oral statement: "As I understand this case there is no use of going any further with it, as the contributory negligence of the plaintiff in this action is such that he cannot recover on it. The case will probably go to the Supreme Court anyway, and I

1. INSTRUO-
TION: order
to find for de-
fendant not:
error without
prejudice.

Milne v. Walker.

think the case, as it is, is as good for the plaintiff as it can be made, and it is better not to make a long and expensive record.

"Gentleman of the jury you will bring in a verdict for the defendant."

The plaintiff objected to the court instructing the jury orally and insists that the judgment should be reversed for this error.

It is true the statute requires instructions given by the court to the jury to be in writing. But this instruction was really not an instruction by the court to the jury directing them as to the law of the case. It was no more than a direction to them to return a verdict for the defendant. If this direction was warranted from the evidence, or rather from the want of evidence in the case, the failure to put the order to the jury in writing was error without prejudice. We would surely not be asked to reverse the case and send it back for a new trial, because of an error which did not and could not influence the verdict.

II. The undisputed facts are that in the spring of 1878 the defendant was the owner of a stallion, which he moved

2. NEGLI-
GENCER: con-
tributory:
law and fact. from place to place making the season. He called on the plaintiff, who is a farmer, and made application for a stopping place with his horse, to which the plaintiff assented. The stallion was, by the plaintiff's direction, put in a stall in the barn, and in the same part of the barn and without any barrier being placed between them, the plaintiff kept a gelding and a mare. The three animals were kept in their stalls by means of halters, with which they were tied. On the defendant's second or third trip in going his rounds, and in the night-time, the stallion broke his halter and attacked the gelding with such violence as to break his leg. The plaintiff knew where the stallion stood in the evening before the injury and knew that he was tied and that his own horses were in the barn.

There is further evidence to the effect that the halter with

Milne v. Walker.

which the stallion was tied was not sufficiently strong to restrain that kind of an animal, and that he was inclined to be cross and vicious. But there is no evidence that the plaintiff did not know the kind of halter with which the stallion was tied, and there is no claim made in the petition that he was a vicious animal, and that plaintiff did not know that fact, and it does not appear that plaintiff was unaware of the character of the animal as to viciousness.

That he must have had some knowledge of the general propensities of stallions must be conceded, for it appears that he was keeping one of his own in another part of the same barn. Under these facts we think the court correctly directed a verdict to be returned for the defendant. That the two parties were equally in fault is apparent, and the plaintiff had no more right to recover damages than the defendant would have had if his stallion had been injured instead of the plaintiff's horse. The plain fact is that when these two parties put their animals in their respective stalls, each took upon himself whatever risk there was in so doing.

We think the undisputed facts in this case show, as a matter of law, that plaintiff is not entitled to recover. *Artz v. C., R. I. & P. R. R. Co.*, 34 Iowa, 153; *Starry v. D. & S. W. R. R.*, 51 Id., 419; *McLaury v. The City of McGregor*, 54 Id., 717.

It is correct as claimed by the plaintiff that the question of negligence does not in all cases become one of law when the facts are undisputed. But if there are no complicating circumstances, and if the undisputed facts are such that a reasonable mind can draw no other conclusion than that the plaintiff was in fault, it is the province of the court to determine the question as one of law.

AFFIRMED.

District Township of Pleasant Valley v. Calvin.

DISTRICT TOWNSHIP OF PLEASANT VALLEY v. CALVIN ET AL.

1. **Contract: ILLEGAL: PARTIES NOT EQUALLY GUILTY.** The board of directors of a district township, in violation of law, loaned the funds of the district to C., who gave to the district township his promissory note therefor with three others as sureties. In an action by the district township on the note against principal and sureties, *held* that the plaintiff was guilty of no illegal act, though its officers and the defendants were, and that plaintiff could recover alike as against principal and sureties.

Appeal from Fayette Circuit Court.

THURSDAY, JULY 13.

ACTION upon a promissory note. The defendant W. H. Harrington answered. There was a demurrer to the answer, which was sustained. The defendant failed to amend his answer. Judgment was rendered against him and he appeals.

Ainsworth & Hobson and G. E. Dibble, for appellant.

Hoyt & Hancock, for appellee.

ROTHROCK, J.—The note upon which suit is brought is in these words:

“\$1,000.

CLERMONT, June 7th, 1876.

“On demand after date for value received we promise to pay to the order of the District Treasurer of District Township of Pleasant Valley, One Thousand Dollars, with interest from date until paid at the rate of ten per cent, payable annually, and if interest is not paid when due to bear interest at same rates and terms. If sued I agree to pay expenses of collecting, including reasonable attorney fee.”

This note was signed by J. P. Calvin, and three other parties, one of whom was appellant.

The following, among other indorsements, was upon said note.

District Township of Pleasant Valley v. Calvin.

"This note was given by J. P. Calvin for money loaned to him by board of directors, and delivered to him by treasurer under protest."

Appellant by his answer admitted the execution of the note, but denied his liability thereon, because the same was given by defendant to plaintiff for public money loaned by plaintiff to defendant in violation of law.

The demurrer was to the effect that the answer did not show that both parties were equally guilty of a violation of the statute, and that said loan was made by the officers of the plaintiff, and the plaintiff was guilty of no wrong.

The act of the board of directors in making the loan was expressly prohibited by law. Code, § 3908. Appellant contends that the note is void and cannot be enforced, as being prohibited by this section of the Code, and we are cited to *Pike v. King*, 16 Iowa, 52; *Watrous & Snouffer v. Blair*, 32 Id., 62, and other cases, in support of the rule, that where a statute imposes a penalty for the commission of a particular act it implies a prohibition, and a contract thus made cannot be enforced. See, also, the later cases of *Kinney v. McDermot*, 55 Iowa, 674, and *Gunderson v. Richardson*, 56 Iowa, 56.

These cases are all upon contracts made upon Sunday, or those founded upon champerty or other contracts involving acts prohibited by law, and where both parties are equally in the wrong. The reason of the rule is, that both parties being parties to the prohibited act, the law will not afford aid to either by allowing him to take advantage of his own wrong, but will leave both where it finds them.

The case at bar rests upon a different principle. The officers of the plaintiff committed a wrong in loaning the money. The defendants, it may be, violated the law in accepting the loan, but the plaintiff committed no illegal act. To hold that it did would involve the absurd rule that a public corporation, like a school district or county, cannot follow funds wrongly appropriated by their officers into the hands of third persons to whom the funds are loaned. Such a rule, instead

District Township of Pleasant Valley v. Calvin.

of administering justice and punishing wrong-doers, would be against public policy. It would in effect be rewarding crime at the expense of the public. The object of the statute which prohibits loaning the school funds is that it may be safely kept and sacredly applied to the purposes for which it is held by school districts. If we were to hold that a wrong-doer may take the money from the treasury with the consent of the officers and agents and then avoid his contract to pay because the act is prohibited by law, the very object of the statute would be defeated.

In *Denning v. State*, 23 Ind., 416, a case much like this in principle, it is said: "The case at bar must be deemed to belong to that class where the parties should not be deemed equally guilty. The auditor who is charged by law with the duty of loaning the fund cannot in any just sense be regarded as a party; he did not own the money; it belonged to others who were powerless to control him, and who had no agency whatever in the transaction which the statute forbade, and though the loss of the money loaned would incidentally subject the officer to liability upon his bond, yet it must primarily fall upon those who are entirely innocent."

It appears from the indorsement on the note that the money was actually loaned to Calvin, and though appellant does not in his answer claim that he has any defense which would not be available to Calvin, in his argument he claims that he did not receive any of the money. We think the appellant cannot escape liability because he was surety for Calvin. His act in executing the note must be presumed to have had as much influence in causing the money to be taken from the treasury as the act of Calvin. That he is equally liable see *Scotten v. The State*, 51 Ind., 52.

AFFIRMED.

Bothwell v. The C., M. & St. P. R. Co.

BOTHWELL v. C., M. & St. P. R. Co.

1. Railroads: KILLING STOCK: INSUFFICIENT EVIDENCE. In an action for damages for two colts killed by a passing train, at the close of the introduction of plaintiff's testimony, the court, on motion of defendant, directed the jury to return a verdict for the defendant, *held* correct, on the ground that the evidence was not sufficient to support a verdict for damages. DAY and BECK, JJ., as to the sufficiency of the evidence, dissenting.

59	198
83	491
59	198
85	175
85	384
59	198
115	136
115	137
59	192
121	130
59	192
140	196

Appeal from Jones District Court.

THURSDAY, JULY 13.

THIS is an action to recover the value of two colts which it is alleged were killed by being run over by one of defendant's trains. There was a trial by jury. At the close of the introduction of the plaintiff's evidence the court, on motion of the defendant, directed the jury to return a verdict for the defendant. Plaintiff appeals.

J. W. Jamison, for appellant.

Sheean & McCarn and *D. S. Wegg*, for appellee.

ROTHEBOCK, J.—The plaintiff owns a farm through which defendant's road passes in such a manner that there is a field or pasture of five or six acres on the north side of the road. The road is fenced through the farm and there is a private crossing, and two gates, one on the north and one on the south side of the track, erected and maintained for the convenience of the plaintiff, in the use of her land on the north side of the road. The gate on the north side opened into the pasture; it did not turn or swing into the right of way of the road. On the morning of October 11, 1881, the gate was open some two or three feet, and two of the plaintiff's colts were found dead upon the right of way, having been killed by a passing train. For some time before the accident the

Bothwell v. C., M. & St. P. R. Co.

two colts which were killed, and another colt and some calves, had been pasturing in the field north of the track.

It appears to be conceded that the colts went upon the track through the gateway. There is no claim that the fence at any other point was defective. And we do not understand that the gate, as originally constructed, was insufficient, either in its construction or fastenings. The only evidence on that point is by one witness who states that "this kind of gates are ordinarily used and considered good." It appears that it was made of inch pine lumber, but of how many boards, what length and how constructed, we are not advised by the record. This is probably to be accounted for by the fact that there was a model of the gate used upon the trial, and the court and jury were thereby enabled to see at once how it was constructed, and the extent of the defects therein, which plaintiff claimed was the cause of the accident. As near as we can tell from the evidence the board in the gate next to the top was broken some two or three feet from the end where the gate fastened. The short end of the break hung down at the broken end of it, and the long end remained in place. It is not claimed by appellant that this opening was sufficient to allow the colts to pass through. It is evident from the above statement that this would be impossible. But it is claimed that one of the colts put its head through this opening and pushed the gate back so that it would open, and thus opened the gate, and that all of them then passed through and on to the railroad track.

If this theory was supported by evidence, either direct or circumstantial, the court erred in directing the jury to find for the defendant. It will be observed that plaintiff does not claim that the gate was liable to be opened by the action of the wind or by animals rubbing against it, as was found to be true in *McKinley v. C., R. I. & P. R. Co.*, 47 Iowa, 76. Neither is it claimed that any witness saw the gate opened by the colts. The evidence which, it is urged, supports the plaintiff's theory is that two men on the day before the acci-

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dent saw a calf attempting to crawl through the opening made by the broken board, and after it had got its head and one or two legs through, one of the men "ran and hallowed" and the calf pulled back and in its struggle getting out of the gate it moved it back so as to clear the fastening and pulled the gate open and passed through.

The men drove the calf back, and one of them raised up the short end of the broken board, and as it was splintered and broken at an angle, he nailed it to the other end and thus left the broken board all in line. This is the last account given of the gate until after the accident, and this is all the evidence excepting that one of the colts was brown and there was some brown hair found on the gate after the accident. The color of the calf is not shown.

We think if the court had submitted this case to the jury on the evidence, and there had been a verdict for the plaintiff, it would have been its duty to have promptly set the verdict aside as being wholly unsupported by evidence. In order to have found a verdict for the plaintiff the jury would have been required to have imagined that one of the colts performed exactly the same feat which the calf executed the day before, and without any person being present to assist it by frightening it into making the struggle which opened the gate. This will not do; verdicts must have evidence to support them and must not be founded upon mere theory or supposition.

AFFIRMED.

DAY, J., dissenting.—I cannot concur in the foregoing opinion. In my opinion the evidence was abundantly sufficient to sustain a verdict for the plaintiff, and the court erred in directing the jury to return a verdict for the defendant.

The colts were in a field separated from the defendant's road by a fence and gate constructed by the defendant. This gate is so constructed that animals can open it. This is proved by the fact that the plaintiff's calf did open the gate

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the day before the plaintiff's colts were found killed. Evidence was introduced tending to show that the gate does not rest on the ground, but slides on a rest between two posts, that it could be opened without raising it up, and that the strength of a good silk thread would open it. On the morning that the colts were found killed the gate was open a few feet, and the board was broken and lopped down the same as it was the day before when the calf got through. The break in the board was an old break. A witness for the plaintiff testified that after the accident he noticed on the upper board where the horses had had their heads through and had been rubbing, and there was hair on it that would resemble the hair and mane of the brown colt that was killed. It is conceded in the majority opinion that the colts went upon the defendant's track through the gate. We have then the gate so constructed that it could be opened by a silk thread, and was in fact opened by a calf the day before the accident; the gate was open the morning that the colts were killed; and the colts passing through the gate upon the track. From this evidence but two inferences are possible. The gate was opened and left open by some person, or was opened by the animals in the field because of its defective construction. In my opinion, in the absence of any testimony that the gate was opened by any person, the jury were fully authorized to find that it was opened by the animals in the field as it had been the day before. The case falls fully within the principle of *McKinley v. C., R. I. & P. R. Co.*, 47 Iowa, 76. In my opinion the judgment of the court below should be reversed.

BECK, justice, concurs in these views.

WOOD v. C., M. & ST. R'Y CO.

1. **Railroads: AUTHORITY OF STATION AGENT: QUESTION OF FACT.** The question whether or not the station agent of a railway company has, as such agent, authority to bind the company by a contract to furnish cars to a shipper at his station at a particular time, is one of fact and not of law, and it was error, *first*, to reject testimony offered by defendant to prove that its agent had not such authority, and *second*, to instruct the jury on the theory that such agents have such authority as matter of law. BECK, J., *dissenting*.

Appeal from Clayton Circuit Court.

THURSDAY, JULY 18.

THE plaintiff alleges that the defendant contracted to furnish the plaintiff, on the 16th day of October, 1879, two cars in which to ship potatoes from Enfield, a station on defendant's road, to Denison, Texas; that defendant failed to furnish the cars until the second day of November, and that by reason of this delay the potatoes were frozen, to the damage of plaintiff in the sum of \$300. The cause was tried to a jury, and resulted in a verdict and judgment for plaintiff for \$452.44. The defendant appeals. The material facts are stated in the opinion.

W. A. Hoyt and Nobles & Updegraff, for the appellant.

W. A. Preston, for the appellee.

DAY, J.—The plaintiff testified that he made the contract for the cars with J. C. Barnes, the station agent of the defendant at Strawberry Point. No proof whatever was introduced of the scope of his agency or the extent of his power, nor of the manner in which he had been held out to the public by the defendant. J. C. Barnes was introduced as a witness on behalf of the defendant and testified that he agreed only to try to get the cars for plaintiff by the time named. Barnes was asked the following questions by defendant: "State

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whether or not, as agent for the defendant, you had, at this time, any authority to contract to furnish cars, at any point, at any particular time."

The plaintiff objected to this question as immaterial, irrelevant and incompetent. The objection was sustained, and the defendant excepted. The defendant asked the court to instruct the jury as follows: "The burden of proof is upon the plaintiff to show that J. C. Barnes, the station agent of defendant, was authorized to bind said defendant by a contract to have cars at Enfield ready for loading upon any particular day; and the fact that said Barnes was station agent of defendant at Enfield aforesaid, is not sufficient evidence to prove that he had authority to bind defendant by such contract."

The court refused to give this instruction, to which the defendant excepted. The court instructed the jury as follows:

"If you find from the evidence that the railway company, by its agent at Enfield, made an agreement with the plaintiff to have cars at that place on the 16th day of October, 1879, for the shipment of the potatoes in question, and if you find that the plaintiff had his potatoes there for shipment on that day, and was prevented from so doing in consequence of the defendant's not having the cars there, and if you further find that the plaintiff was diligent to preserve the potatoes from damage until they could be shipped, and that in consequence of such neglect to have the cars there, the plaintiff's potatoes were frozen, then the defendant is liable for such damage." To the giving of this instruction the defendant excepted. These several actions of the court are assigned as error. The court evidently assumed that a station agent, as such, must, as a matter of law, have authority to bind the company by his contract to furnish cars at a given station, at a particular time. It is urged by appellant that it would be impracticable to confer such power upon a mere local station agent. It is said that the disposition of cars must, of necessity, be under the control of some central head, cogniz-

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ant of the necessities and demands of the whole line of railway. There seems to us to be much force in these suggestions. But we have not now to deal with the question whether it would be practicable to confer such power, but whether such power has in fact been conferred, or the station agents of the defendant have been held out to the public as possessing such power. This is a question of fact, and not of law. Courts cannot say as a matter of law that station agents must possess the power to bind the company by such contracts, nor can the courts take judicial notice that such agents possess such power, or are held out to the world as possessing it. The defendant proposed to show whether or not the agent did possess power to bind it by such a contract. In rejecting the proffered testimony the court erred. The court also erred in giving the instruction excepted to and in refusing the one asked.

REVERSED.

BECK, J., dissenting.—Railroad corporations as common carriers are under obligation to receive and transport, with promptness and fidelity, all property delivered at their cars or at places or in warehouses designated by their course of business. The time of the receipt of property for transportation may be regulated by contract between carriers and consignors.

Railroads are managed by officers of the corporations at their principal place of business, who employ subordinates at the various towns and stations through which the roads run. These subordinates are called station agents and they have the authority to receive property for transportation. It cannot be pretended that if a consignor offers property for transportation the station agent is not authorized to bind the corporation by a contract to carry it. The company cannot protect itself by withholding authority from its agent to make such contract. If it could do this it would be able to defeat the rule obligating it to receive and carry all property offered

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for transportation. In order that it may discharge this obligation it employs station agents, and the law will not permit it to so limit the agent's powers that it may refuse to carry property at the pleasure of its officers. If a station agent can contract to carry property to-day, he may bind the corporation by a like contract to carry it to-morrow. This power of the station agent to contract for future transportation is of the first importance to the business of the country. It is certainly true that much of the property transported by railroads is carried under contracts of this character.

The most important duty of station agents, so far as shippers are concerned, is to provide cars for the future transportation of property. Shippers must know the time cars will be supplied them in order to have the merchandise at the depots, or elsewhere, ready for shipment. In the case of live stock and perishable articles the railways always contract to furnish cars at a given time. Any other course of business would entail loss upon shippers of such articles and would operate as an embargo upon the business of shipping fruits, vegetables, ice, poultry, and even fat hogs. No shipper could buy potatoes in the fall of the year and store them in warehouses, unless he could depend upon the contracts of the railroads to furnish him cars to ship them before the freezing weather should set in.

As a matter of fact, in the course of the business of the roads, station agents do make contracts for the furnishing of cars and are authorized to do so. The station agent and no other person is accessible to the consignor. It is true that the cars of a railroad are under the control of one officer, but he speaks through the station agent, who is accessible to him by telegraph every minute of each day. The station agent makes the contract under the direction of the proper officer having control of the cars. As it is impossible for the shipper to contract with any other officer, and as the station agent is authorized to make contracts for cars, his contracts are binding.

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These considerations lead me to the conclusion that the law will regard the station agent as fully authorized to make contracts for the future transportation of property.. It was not, therefore, necessary for plaintiff to prove that the station agent was authorized by the defendant to make the contract for the transportation of his pótatoes at a future day. The law presumes that he did possess such power. In my opinion the judgment of the Circuit Court ought to be affirmed.

59	200
83	388
59	200
100	172
59	200
102	570

CRAIG v. FOWLER.

1. **Constitutional Law: code, section 3058, unconstitutional.** An officer who, under an execution, seizes the property of one not the execution defendant is a trespasser, and is liable to the owner of such property in an action for damages; and section 3058 of the Code is unconstitutional in so far as it seeks to bar such an action by the taking and returning by the officer of an indemnifying bond as provided by sections 3055, 3056. The reasoning of *Foule & Roper v. Mann*, 53 Iowa, 42, held applicable and followed.
2. **Fraud: method of proof: admissibility of testimony.** Fraud, and the knowledge of fraudulent designs and transactions, cannot in many cases be proved except by circumstances; and when evidence offered tended to establish facts and circumstances which would have aided in disclosing the real purpose of the parties, it was error to exclude it.
3. **—: delaying creditors: instruction.** An instruction to the effect that if plaintiff held an honest claim against her husband, she could not use it for the purpose of hindering and delaying other creditors, *held* good in substance, though wanting in explicitness.
4. **—: evidence: instruction.** An instruction in substance as follows: "Any fraud of the husband, if any has been shown, in encumbering or disposing of his property, cannot affect the plaintiff, unless she knew of and assented to or aided in it at the time, and, even then, fraud shown in other transactions will not be sufficient alone to show fraud in this one. It can only be considered as showing the general course of dealing of the parties, and as a circumstances bearing on the general probabilities of the case," *held* not erroneous.

ADAMS and DAY, JJ., *dissent* as to the first point.

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Appeal from Greene Circuit Court.

THURSDAY, JULY 13

ACTION to recover the value of a stock of drugs, medicines, and other merchandise, seized and sold by defendant, who was the sheriff of the county, on certain executions issued upon judgment against John Craig, and J. R. Craig, plaintiffs, husband and son. There was a judgment upon a verdict for plaintiff. Defendant appeals.

H. S. Winslow, for appellant.

McDuffie & Howard and *C. H. Jackson*, for appellee.

BECK, J.—I. The defendant alleges that after the levy of the executions and upon receiving a notice from plaintiff that she was the owner of the property seized, an ^{1. CONSTITU-}_{TIONAL LAW:} ^{code, § 3058} indemnifying bond was executed by the plaintiff. ^{unconstitu-}_{tional.} Ifs in execution, in pursuance of his demand therefor, which was by defendant returned to the District Court of the county wherein the levy was made. The part of the answer containing these allegations was stricken out on the ground that it set up no defense to the action. This ruling is the first ground of complaint on the part of defendant.

Code, section 3058, provides that an action against an officer seizing property on execution is barred, if an indemnifying bond has been taken and filed in the proper court as required by sections 3055, 3056. Under these statutes defendant insists that an action cannot be maintained against him.

We have held that section 3058, so far as it prohibits an action of replevin against an officer to recover the specific goods seized by him, is unconstitutional and void. *Foule & Roper v. Mann*, 53 Iowa, 42. But it is insisted that the provision in so far as it is applicable to an action to recover the value of property seized by the officer, is not in conflict with the constitution.

The provision, if it be enforced, would bar a remedy against

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an officer who seizes goods that are not subject to the execution in his hands, for the reason that they are not the property of the defendant against whom the writ issues. When the property is seized under such circumstances the officer is a trespasser. His writ does not authorize him to seize the property. The owner has a valid claim against him for the value of the goods seized. This claim of course is the property of the owner of the goods. We know of no power possessed by the legislature to deprive the owner of the goods of this property right which he holds against the officer. Surely the legislature could not by enactment provide that a debtor, by making prescribed arrangements with another person, could cause such person to be substituted as the debtor and himself escape liability to the creditor. Yet this is the precise thing the statute in question aims to accomplish. It declares that the trespasser shall cease to be the debtor of the party whose goods are wrongfully taken, if other persons will in the manner prescribed take his place.

It is no reply to this argument to insist that the statute is intended for the protection of the officers of the law. The law does not and ought not protect them when they violate the rights of property of persons against whom they have no writs. But they have ample protection by the indemnifying bonds which they may demand. If these bonds are sufficient they can suffer no loss.

We think the statute, if enforced so as to bar actions against ministerial officers in cases like the one before us, would result in gross abuses and oppression. The reason and principles upon which the decision in *Foule & Roper v. Mann* is based, are applicable to the case of an action to recover the value of goods illegally seized by a ministerial officer.

II. The plaintiff in this case is a married woman and the wife of one of the execution defendants and the mother of the other. The issues in the case involve the question as to whether the property levied upon belonged to her or to her husband and son. She

2. FRAUD:
method of
proof: admis-
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mony.

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claims that she bought the goods with money she held in her own right. On the other hand, defendant insists that the property was bought with the money of her husband. Plaintiff testifies that she loaned her husband money which he invested in property and afterwards paid her part, at least, of the sum borrowed, which she invested in the merchandise in question. The husband was involved in debt and conveyances and mortgages of property to the son are shown. There is evidence tending to show that he attempted to cover his property from his creditors.

The defendant in the examination of the plaintiff and other witnesses asked many questions tending to show the business transactions of the father and son, their declarations showing an intent to defraud their creditors, and the knowledge of the plaintiff of their practices and purposes. This was, we think, erroneously excluded.

The burden rested upon defendant to show fraud on the part of her husband in covering up his property by causing the title to be held by his wife. The wife's knowledge and participation in the fraud defendant was required to establish. Fraud cannot always be shown by direct evidence, but is usually proved by circumstances. Neither can the knowledge of or participation in fraudulent designs and transactions be proved in many cases except by circumstances. Those who are charged with fraud in transactions investigated in a court of justice, when called upon to give evidence in regard to such charges, are always subject to such an examination as will disclose their knowledge of the fraud and purposes connected with the transactions. So, if, on account of the relations of the parties, confidence may be presumed to exist between them, the law will favor such an examination, when they are required to testify touching matters alleged to be fraudulent, as will disclose their true character.

Fraudulent practices, of like character about the time of the transactions in question, and knowledge of such practices by one charged with participation in the fraud, may be shown.

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The evidence offered and excluded tended to establish, we think, facts and circumstances which would have aided to disclose the real purposes of the parties. It ought to have been admitted. The court below ought to have given greater latitude to the examination of plaintiff and other witnesses. *McNorton v. Akers*, 24 Iowa, 369; *Price v. Mahoney*, Id., 582.

It is not necessary here to recite the questions which we think defendant ought to have been permitted to ask. The application of the rules we have stated will clearly indicate at another trial what evidence ought to be admitted.

III. There was no evidence tending to show that the goods in controversy were purchased by plaintiff of her husband and son. She testified that she had money in her own right which she loaned to her husband, and which he subsequently repaid. This money was used by him in the purchase of the stock of merchandise levied upon. Defendant asked certain instructions to the effect that if plaintiff held an honest claim against her husband she could not use it for the purpose of hindering and delaying other creditors. The thought of the instruction seems to be that plaintiff, though she held an honest claim against her husband, could not, under pretense thereof, cover the property of her husband so as to delay or defeat his creditors. The instructions probably are wanting in explicitness and could be made more clearly to express the rule intended. But the substance of the instructions ought to have been given to the jury.

IV. The court gave the jury the following instruction, the twelfth: "Some evidence has been introduced regarding other transactions of plaintiff's husband, with his property. It should be borne in mind that any fraud of the husband, if any has been shown, in encumbering or disposing of his property, cannot affect the plaintiff, unless she knew and assented to or aided in it at the time, and even then fraud shown in other transactions, if so shown, will not

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be sufficient alone to show fraud in this one. It can only be considered as showing a general course of dealing of the parties and as a circumstance bearing on the probabilities of the case." This instruction defendant insists is erroneous, in that it fails to state that if plaintiff had notice of such facts as would have put an ordinarily prudent man upon inquiry that would have led to a knowledge of the fraudulent acts of her husband, she is chargeable with knowledge thereof. In support of this objection counsel cite *Jones v. Hetherington*, 45 Iowa, 681. The rule of that case is to the effect that knowledge of a fraudulent character of a sale of goods, which is the subject of the suit, will be inferred from circumstances which are sufficient to raise inquiry. But the instruction under consideration did not relate to the particular transactions involved in the action which is alleged to be fraudulent, but to other transactions from which the transaction in question may be inferred to be fraudulent. It appears to us that the rule of the case cited cannot be extended to transactions other than the one assailed by the action. It will not do to hold that because plaintiff could have discovered that other transactions of her husband were fraudulent, upon inquiries suggested by facts within her knowledge, the inference is raised that the payments of money to plaintiff by her husband and her purchase of the goods therewith were fraudulent.

Other questions discussed by counsel need not be considered. For the errors above pointed out the judgment of the Circuit Court is

REVERSED.

ADAMS, J., *dissenting*.—I think that the court erred in striking from the answer the allegations based upon the provision of the statute contained in section 3058 of the Code. I do not think that the statute is unconstitutional. While, therefore, I concur in the reversal of the case, I do so upon the ground that the court erred in holding that the statute

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is unconstitutional. Upon the other points I express no opinion.

Section 3058 of the Code is in these words: "The claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property if the surety on the bond was good when it was taken. Any such claimant or purchaser may maintain an action upon the bond and recover such damages as he shall be entitled to." The provision of the constitution alleged to be violated is in these words: "No person shall be deprived of life, liberty, or *property*, without due process of law." Art. 1, § 9, Constitution of Iowa. It has been held in *Foule & Roper v. Mann*, 53 Iowa, 42, that where the property of a third person is seized upon execution he is *deprived* of it, notwithstanding his title is not divested by the seizure, nor by a sale thereunder, and the process being quite clearly, so far as he is concerned, not "due process of law," within the proper meaning of those words, it followed that the provision was unconstitutional so far as it was designed to bar an action of replevin. The case before us is to my mind entirely different. We have to determine whether the plaintiff's alleged claim can, under the statute, be properly held to be in the nature of property. If it is she is without question deprived of it. The question in *Foule & Roper v. Mann*, was as to the *effect* of the seizure and sale upon what was indisputably property.

Proceeding then to inquire whether the plaintiff's alleged claim can, under the statute, be properly held to be property, I have to concede of course that where a person's property is seized upon an execution against another, he would, but for the statute, have a claim against the officer for damages, and that such claim would be in the nature of property. I have to concede, also, that such claim having once properly arisen it could not be taken away by statute. But where the statute is enacted in advance of the seizure, I do not think that

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the claim arises. The trespasser is the execution creditor. He alone is in fault. The officer becomes the blind, and it may be, the unwilling instrument of the law which the creditor uses. It is proper and competent I think, therefore, for the law to make him irresponsible.

Let us see into what kind of a dilemma the majority opinion leads us. The statute imperatively requires an officer, who has been indemnified, to proceed to subject the property to the execution; and this court held in *Evans & Son v. Thurston*, 53 Iowa, 122, that he could not escape the obligation. We have then an act which it is legal and illegal to do; or to put the case more strongly we have an act which it is illegal to omit to do and illegal to do.

In my opinion the true view is that no person can be deemed a trespasser for doing what the law requires him to do. I am not able to entertain any doubt. But if I did it would not follow that I should be justified in holding the statute unconstitutional. A statute is not to be held unconstitutional which is merely of doubtful constitutionality. It is not for a court to lightly impugn the action of a co-ordinate branch of the government.

MR. JUSTICE DAY concurs with me in this dissent.

Jasper County v. Osborn.

59 208
99 724

JASPER COUNTY v. OSBORN.

1. **Pauper:** MAINTENANCE BY SON. The son of a poor person, unable to maintain himself by work, is liable to the county for money expended in support of such poor person upon the order of the township trustees, and may be compelled by order of court to support him.
2. **Practice in the Supreme Court:** OBJECTION NOT RAISED BELOW. A defense not pleaded and an objection not raised in the court below cannot be heard for the first time in the Supreme Court.
3. **Pauper:** WHO IS. Although a man has a homestead right in forty acres of land, and is the owner of certain personal property kept on said land, yet if he is aged, infirm, and otherwise destitute, and unable to maintain himself by labor, and his homestead and personal property are in the control of his wife and children, who by their cruel and inhuman treatment, make it impossible for him to live at home, or, without litigation, to control or enjoy his personal property, he is a "poor person" in contemplation of the statute. ADAMS and SEEVERS, JJ., from their views of the evidence, *dissenting*.
4. ——: ACTION FOR MAINTENANCE. While the wife of such a person is liable to the county for his support, or to any citizen who might take care of him, yet the county may waive its right of action against her and pursue its remedy against the son.
5. **Evidence:** FACTS NOT OPINIONS. Witnesses who are not experts, can be heard to state facts only, not opinions.

Appeal from Jasper Circuit Court.

THURSDAY, JULY 13.

THIS action was brought to recover money expended upon the order of the township trustees for the support of John Osborn, father of defendant, alleged to be a poor person, who is unable to maintain himself by work, and praying for a judgment and order of the court requiring and compelling defendant to support his father. There was a judgment granting the relief sought in plaintiff's petition. Defendant appeals.

H. S. Winslow, for appellant.

Smith & Wilson, for appellee.

BECK, J.—I. Henrietta, the mother of defendant and wife of John Osborn, was joined as defendant in the action. She.

Jasper County v. Osborn.

with her son Henry, answered the petition alleging that John, the father and husband, had left his house voluntarily; that the wife at the time of her marriage owned all the property, "and with this property all the lands were purchased," and that the husband by imprudence squandered a large part of "their means," to which course of conduct the wife made objection, which gave offense to the husband and he thereupon became harsh and cruel. They declare in their answer, "that now and always, so long as he shall behave himself, and will share with defendants their house, he can do so, and defendants now here, as they have heretofore done to the trustees, tender to him their home and support." Pending the trial the cause of action as to Henrietta was dismissed.

The court made and filed a finding of facts from which it appears that application as required by law had been made to the township trustees for board and clothing for John Osborn, which were supplied to the value of \$48, and that certain notices were given by the trustees to defendant. The other findings of the court which need be presented here, are in the following language:

"3. That at the time of applying for and receiving said relief, board and clothing, John Osborn was, and still continues, a poor person, unable to maintain himself by work.

"4. That said defendant, Henry Osborn, the son of said John Osborn, is twenty-seven years old and unmarried, living with his mother, John Osborn's wife, on her farm in Fairview township.

"5. That up to the time of said John Osborn's application to said trustees, as aforesaid, he had been living with his wife and son, Henry Osborn, the defendant, but said John Osborn was not then being maintained by them, or either of them, in the manner which his necessities and condition required, nor had either so maintained him for some months past.

"6. For some years immediately preceding December 6th, A. D. 1880, Henry Osborn and his mother on the one side, and the father and husband on the other, had frequent and

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bitter quarrels, which sometimes led to personal violence; but who, if any one of them has been the most to blame does not clearly appear. John Osborn, however, being sixty-nine years old, and quite infirm and sometimes sick, was compelled to, and did, yield the control of the household, farm and business to his son, Henry Osborn, and his wife, Henry's mother, who appear to have been industrious and frugal.

"7. That at said December 6th said John Osborn had, has now, perhaps, the right to some personal property such as is usually found on a farm, but what it or its value was or is, does not clearly appear. It had all slid into the possession of, or had been by superior force taken possession of, by Henry Osborn and his mother, so that John Osborn was not then, and has not since been, in the control or possession of any property of any sort, real or personal. Said defendant, Henry Osborn, is not now, and has not been at any time since December 6th, A. D. 1880, of ability, without personal labor, to maintain his father, said John Osborn, in the manner which his necessities and condition require.

"8. That said John Osborn has besides the defendant, Henry, another son of age and in business for himself, but not a resident of Jasper county, and a daughter Julia and son Charles, both minors, living with Henry and their mother in Fairview township."

II. Counsel for defendant insist that upon the facts found the court ought not to have rendered the judgment against 1. PAUPER: defendant. The third finding is that "John Os-
^{ma}_{by son.} born was, and is, a poor person, unable to main-
tain himself by work," and by the fourth the court finds that defendant is his son. Under these findings the defendant is liable for the support of his father. Code, § 1330.

III. Counsel for defendant also urge that as the seventh finding shows that defendant is not "of ability, without per-
2. PRACTICE: sonal labor, to maintain his father," he is not
^{in supreme}_{court: objec-} shown to be able to render the support required,
_{tion not}
_{raised below.} and therefore judgment ought not to have been

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rendered against him. But no such defense was pleaded in the answer, and no such objection was raised in any form in the court below. It cannot be first raised in this court.

IV. It is also urged that the evidence fails to support the finding of the court that John Osborn was a poor person for ^{a PAUPER:} whose support the law will hold his son liable. ^{who is.}

The objection is based upon the ground that the evidence discloses the facts to be that he is the owner of certain personal property, and has a homestead interest in the forty acres of land occupied by the family as a home. The fifth and sixth findings of fact are well supported by the testimony. It is true that he has the lawful right to occupy his homestead and to hold the possession of certain personal property. But by the violence and ill treatment of his wife, defendant, and his other children, he was driven from his home and deprived of the use and benefits of his personal property. The testimony tends to show the most brutal treatment toward the husband and father by the wife and children. He was more than once assaulted by defendant, who was fined on one occasion for the offense; the wife threw buckets of water upon him; and the daughter, who seems to have had an organ in the parlor, forbid him to enter that room, and the younger son, a lad of thirteen, threw clods of dirt upon him, and all habitually used towards him abusive language. He was kept in the cellar and required to sleep there and refused money to buy necessary articles for his comfort, and, in short, was treated with violence and indignity, the recital of which would not fail to shock human sensibility. The family charge that he was cross and unpleasant. We wonder how he could be expected to be otherwise, surrounded as he was, by such tormentors of his own blood and family. He was sixty-nine years of age, infirm of health, being a cripple from diseased legs. Such being his physical condition, he found it necessary, in order to escape the torture inflicted upon him by his own family, to leave his own house, even though starvation threatened him away from home.

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His wife had coerced him into giving her a deed of their land, eighty acres. She, and her son, had assumed control of all his personal property. Of course the law secures to him a right to occupy his homestead with his family, but their violence rendered that impossible. The title of the personal property was in him, but the son had it in possession. His wife and son would give him no money. They agreed in writing with the trustees, before this suit was brought, to permit him to return to their home, and that they would pay him one dollar a month to enable him to buy necessary articles of comfort. But he could not remain at home and the one dollar a month was not paid him. The right to the homestead and to the personal property, unless they were enforced by proceedings at law, would give him neither shelter nor food. He had no money to institute actions to enforce his rights, and could he have done so without money, he would have starved before he could have realized support in that way, did no other means exist for providing him with food. It is said that his property and rights gave him credit which he ought to have used for his own support. We think the helpless old man, a refugee from the cruelties of his family, would have little credit on account of the property withheld from him by his family.

It would be a reproach to our laws if one so destitute, so afflicted with disease, and the worse affliction of an ungrateful and cruel family, would be refused the support given paupers. He was destitute and in want; he had no money or other means that could be applied to his support. He was a "poor person" in the most destitute condition. The law contemplates that the children of such persons shall be liable for their support. Code, §§ 1330, 1333.

V. It is urged that the wife of Osborn was liable for his support and therefore he was not authorized to call upon the 4. ____: ac- county. But the difficulty in the way of this position for maintenance. sition is, that while depending upon her for support he would have starved. His right to claim support

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from her, like his right to occupy his house, could not have been enforced except by appeal to the law. While enforcing this right he required food and shelter. Doubtless, she would be liable for his support to the county or to any citizen who would humanely take care of him. But the county may pursue its remedy against the defendant and waive its remedy against the wife.

We think *Stewart v. Sherman*, 5 Conn., 244, is hardly in conflict with these views. It appears that the plaintiff in that case, who had rendered support to the alleged pauper, held a note belonging to the pauper; at least such was claimed to be the fact by the defendant. The court held that if the pauper had an estate he was bound to support himself, and the town could not be charged for his support. But the case does not meet the facts before us, namely, that the pauper while holding a right to occupy his homestead was driven from it, and his wife and family, while, in law and morals, they were bound for his support, refused to discharge their duty in this respect, and that he would have been exposed to suffering and starvation had he not received support from the township trustees. It must be remembered too, that in the case just cited the person granting relief to the pauper seeks to recover from the town; in this case the county having voluntarily rendered support to the pauper, seeks to recover therefor from his son, whom the law holds liable for his father's support.

VI. Defendant offered as a witness in his behalf his sister Julia, who was a member of John Osborn's family. He asked ~~EVIDENCE~~: her "if it was not for his own conduct, whether facts, not opinion. her father could not live at home?" The witness was not permitted to answer this question. The ruling is correct. It sought to elicit an opinion of the witness. She was authorized to state facts, and not opinions, based upon facts. The foregoing discussion disposes of all questions in the case. The judgment of the Circuit Court is

AFFIRMED.

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ADAMS, J., dissenting.—The findings of the court do not in my opinion show that John Osborn was a “poor person” within the meaning of the statute. The findings show affirmatively that he had “the right to some personal property such as is usually found on a farm.” Mrs. Osborn in her testimony says: “We have hogs, cattle, and horses; we have stock.” The holding that he is a “poor person” appears to be based upon the idea that he has been deprived of the possession of his property. But it is not so found by the court nor does the evidence so show. The finding is that the personal property “had all slid into the possession of, or had been by superior force taken possession of by Henry Osborn and his mother.” The court did not find positively that any force had been used, and I am unable to discover any evidence that there had been. Mrs. Osborn in speaking of her husband said: “He has had as much control of the property the last two years as any one if he wants to,” and I am not able to find any evidence to the contrary. The defendant Henry Osborn appears to have been at work upon the farm as an employe. The undisputed evidence shows that the work was done upon the farm mainly by Mrs. Osborn and her children, and that the defendant Henry took the lead. To this extent the personal property had slid into the possession of Henry and his mother. But while Osborn was living with his family, he appears to have been in the possession of his property in the same sense that any farmer is in possession of his property upon his farm, while living with his family upon the farm, but on account of bodily infirmity not participating to any great extent in its care or management. The evidence, I think, does not show that he was ever denied the right to make sale of what they had to sell, if he chose to exercise the right. It is shown, indeed, that he did sometimes exercise such right and receive the money. He was not unable to do so, and his omission to do so appears to have been a matter of his own volition. I cannot, then, attach much importance to the finding that the

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property on the farm had slid into the possession of Mrs. Osborn and the defendant Henry.

The majority opinion proceeds upon the theory that Osborn was driven from home, or at least that he was justified in leaving it; but the court below did not so find, and I think could not properly have done so upon the evidence. It may be conceded that the evidence shows that Osborn's family did not at all times use proper language toward him. But it was not wholly the fault of the family. Osborn was addicted to drink, and quarrelsome; and while he said in his testimony: "I have as much affection for my wife as men generally have for their wives," the undisputed evidence shows that he struck her at four different times, and for years threatened to kill her. He admits that he made such threats, and it is proven that he told his neighbors that he intended to kill her, and also intended to kill his son Henry.

The majority opinion states that Henry struck his father and was fined for it. This is not denied. But if this fact is of any importance as tending to support the ruling that Osborn was a proper subject for county relief, it ought to be stated that there were mitigating circumstances. On one occasion when the family was at table, one of the too frequent family altercations occurred. Osborn was about to strike his wife with a chair when Henry struck him with his open palm upon the face. This is all the violence, I think, which the evidence shows was inflicted by Henry or his mother. It is true Osborn testifies that his wife threw water upon him, but she denied it, and the court below made no such finding. He testified that he was kept in a cellar. But what he called a cellar appears to have been a basement room, with half windows above ground, and furnished with a stove and a little other furniture. Besides, according to the testimony of three witnesses, each as credible as he is, he was not kept there, but had the freedom of the house, and occupied the basement when he did occupy it, only from choice. The court, indeed, found that "the defendant and his mother

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have offered, and have at all times been willing to maintain said John Osborn in sickness and in health as they do themselves." This shows that he had the freedom of the house and shared with the other members of the family in whatever comforts they enjoyed. It is true that the court found that in sickness Osborn was not furnished with what he needed. The evidence shows that at one time Osborn was sick and thought he needed a physician, but the other members of the family thought otherwise and no physician was called. The sickness does not appear to have been a serious one. He recovered, and was not justified I think in leaving home upon such ground.

There are some statements made in the opinion as to the treatment which Osborn received from his younger son, about fourteen years old, called Charlie. On one occasion it appears that Charlie threw some clods of dirt at him. Whether this was done in pleasantry or a quarrel does not appear, but we presume it was in a quarrel. Yet Henry testifies that Charlie was his father's best friend. I do not think that. Osborn was justified in leaving home. The evidence shows that there had been no unkindness or trouble for several weeks before he left. He admitted this, and stated that he did not think of applying for county aid when he left.

But if he had been justified in leaving home, I do not think that for that reason he could be deemed a "poor person" within the meaning of the statute, regardless of the amount of property of which he was the owner.

Ch. J. SEEVERS concurs with me in this dissent.

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WATTERS ET AL V. CONNELLY ET AL.

1. **Notice: possession of land.** The possession of land is sufficient notice to a person taking a mortgage thereon from the holder of the legal title of the equitable title which the person in possession has in the land.
2. _____: **Extent of notice.** Actual possession of a part is legal possession of the whole of a tract covered by the title under which the actual possession of the part is taken, and possession of the part will impart notice of the possessor's title to the whole tract.
3. **EstoppeL: facts not constituting.** Where D. and P., the legal title holders, mortgaged to the plaintiff a section of land, the half of which had been sold, but not deeded, to J., who was in possession, and the money borrowed on the faith of the mortgage was applied partly to discharge a prior mortgage placed by D. and P., without the knowledge of J., on the whole section, and partly to the payment of certain judgments against D. and J., or P. and J.—the purpose being to discharge the liens against D. and P.—and it appeared that J. had no knowledge at the time that his land was covered by plaintiff's mortgage, and there was no evidence that he knew the manner in which the money borrowed of the plaintiff was to be appropriated, and it was not shown that the appropriation of the money was made through his procurement or upon his request; *held*, that he was not estopped from resisting the enforcement of the mortgage against his land.

ADAMS, J., dissenting.

Appeal from Webster District Court.

THURSDAY, JULY 13.

Action to foreclose a mortgage. There was a decree of foreclosure as to part of the land, and the petition as to the other part was by the decree, in effect, dismissed. The plaintiffs appeal. The facts of the case appear in the opinion.

J. F. Duncombe, for appellant.

M. D. O'Connell, for appellee.

BECK, J.—I The mortgage which is the foundation of the action, was executed January 2, 1877, by Daniel O. Connally and Patrick Connally, with their wives, and conveyed

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the south half of section 25, township 89, north, range 29 west, and east half of section 25, towship 89, north, range 39 west.

The defendants, James Connelly and his wife, in their answer allege that in June, 1868, Daniel O. Connelly, the father of James, being indebted to him for services of himself for five years, and for the service of his wife for one year, sold to him and his wife the east half of section 25 above described in payment of this indebtedness. No deed or other writing witnessing the sale was executed, but the defendant James at once took possession of the land, a house having been built thereon by his father which he occupied with his family as his home, and paid taxes on the land from 1868 until the present time. He claims that at the time the mortgage was executed he was the owner of the land of which his possession gave notice to the world.

The plaintiffs in reply to the answer of defendants, James and his wife, deny their interest in, and claim to, the land, and aver that it was the property of the father Daniel O. Connelly. They further allege that the mortgage, which plaintiffs seek to foreclose, was given for money loaned by them, which was applied to the payment of a mortgage executed by Daniel O. and Patrick Connelly to the *Aetna Life Insurance Company* upon the land in question, and to the satisfaction of several judgments against James, which were liens upon the land. Plaintiffs claim that by reason of these facts and transactions defendants, James and his wife, are estopped to set up any interest or title they may hold in and to the land against plaintiffs mortgage.

By the decree rendered in the court below the mortgage was foreclosed as to the south half of section 19, and foreclosure was refused as to the land claimed by defendants James Connelly and his wife. Certain defenses were pleaded by the defendants other than James and his wife, which need not be here further noticed as no appeal was taken in that branch of the case. We are only required to determine

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whether the evidence and the law supports the decree of the District Court discharging the land claimed by James Connelly and wife from the lien of the mortgage.

II. We think the evidence satisfactorily establishes a sale of the land in question in 1868 to James by his father. James testifies positively to such sale and his evidence is corroborated by the testimony of his wife and brother-in-law, Fitzpatrick. The same witnesses testify that James had served his father for about seven years after he attained his majority, and his wife, after his marriage, had rendered service to the father for one year. The land was given by the father in payment for these services. In 1868 James and his wife went into possession of the land, and afterwards used and occupied it as his own property. They paid the taxes upon the land and plowed about 120 acres and made other improvements thereon. The sale of the land and the possession thereunder by James, we think, is clearly shown.

Their possession and cultivation of the land was sufficient to put the plaintiffs in this case upon inquiry and impart

^{1. NOTICE:} notice of the interest in, and equitable title to, possession of the land held by James. This conclusion is based upon elementary principles of the law.

See 4 Kent's Com., p. 179, *et seq.* Wade on Notice, sections 278-279; 2 Leading Cases in Equity (Am. Notes), p. 165. The inquiry thus suggested would have revealed to the plaintiff the equitable title held by James Connelly to the land.

III. We are required in the next place to determine the extent of the interest of which the possession of James gave

^{2. —: —:} notice, or in other words, the quantity of land ^{extent of notice.} which he can hold free from the mortgage.

The half section of land in controversy was not wholly inclosed by fences and was not wholly cultivated. About 120 acres were plowed, the remainder was unbroken prairie. The cultivated land was partly upon each quarter section, but probably it did not extend to each forty of the tract. Plaintiffs'

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counsel insist that if defendant's possession of the land imparted notice of his equities, they extended no further than to cover the land in actual cultivation.

It is a well settled rule applicable to the question of adverse possession of lands, when the protection of the statute of limitations is invoked, that actual possession of a part is legal possession of the whole of a tract covered by the title under which the actual possession of the part is taken, and that possession of the part will impart notice of claim to the whole tract. *Langworthy v. Myers et al.*, 4 Iowa, 18; 2 Washburn, on Real Property, p. 497, Sec. 36; p. 500, Sec. 44, and notes. *Anderson v. Darley*, 1 Nott. & McC., 369; *Eifert v. Reed*, Id., 374; *Bailey v. Carleton*, 12 N. H., 9; *Little v. McGuire*, 2 Me., 176; *Cluggage v. Duncan*, 1 Serg. & R., 111.

The reasons which support this rule require us to apply it to the case of notice of an equitable title imparted by possession. When the question is one of adverse possession, occupancy of a part of the land will carry the possession to the whole tract for the reason that the possession is presumed to be as broad as the claim of title. No other rule would be just and equitable in this country where it often happens that the whole of a tract is not reduced to actual possession by inclosure and cultivation. Besides, the lands being subdivided by government surveys—the unit of such subdivision being the section (see *Martin v. Cole*, 38 Iowa, 141), claims of title are usually limited in extent by such surveys. The quantity of the land owned by each citizen is not uniform. It may be the unit of the government survey, a section of 640 acres, or the one-sixteenth of a section, of 40 acres. But whatever be the quantity, it usually conforms to some government subdivision. Now the notice of his equity imparted by the possession of the land-owner who holds no recorded title, ought to extend to his claim as limited by the government survey. Indeed, we think, in our own State no one would entertain the thought that a citizen, who has commenced the improvement of a farm by breaking a few acres of

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prairie, would limit his claim to the land he actually reduced to cultivation or enclosed with a fence. It would, in such a case, be understood that his claim extended to a government subdivision and the person put on inquiry by his possession would seek of him information as to its extent. It cannot be doubted that a possession sufficient to impart notice of an equity, may be of such a nature as would suffice to constitute adverse possession.

Adverse possession of a part, as we have seen, is construed to extend to, and cover the entire tract claimed by the possession. Under these cases possession of part imparts notice of the claim to the whole tract covered by the equity under which the land is held.

IV. Counsel for plaintiffs insist that defendants are estopped to set up their claim to the land for the reason that the ^{a. ESTOPPEL:} money borrowed upon the faith of the mortgage ^{facts not constituting.} was appropriated to the payment of another mortgage executed by Daniel O. Connelly upon the land, and to the payment of certain judgments against the defendant James.

It is shown that James had no knowledge of the execution of the mortgage just spoken of, and it is not shown that the judgments were rendered for debts which he owed as principal. In all of them, we believe, his father, or Patrick Connelly, or both, were also defendants. It was the purpose in paying the judgments to discharge the liens standing against Daniel O. and Patrick Connelly. It is shown that James had no knowledge at the time that his land was covered by the plaintiff's mortgage, and there is no evidence that he knew the manner in which the money borrowed by plaintiff was to be appropriated; certainly, it is not shown that the appropriation of the money was made through his procurement or upon his request. We think there exists no ground upon which the estoppel will rest, precluding him from resisting the enforcement of the mortgage against his own lands. The foregoing discussion disposes of all questions arising in

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the case. In our opinion the decree of the District Court is correct and ought to be

AFFIRMED.

DAY, J.—If the plaintiff's mortgage had been taken only upon the portion of the land claimed by James Connelly, of which there was no visible possession, there would be great doubt whether the possession of a part not included in the mortgage would operate as notice to the plaintiff, for if a party buys, or takes a mortgage upon a forty of land to which his vendor or mortgagor has the legal title, and the property is not visibly in the possession of any one, by improvement or otherwise, there is nothing to put him upon inquiry. But this case is different. Here the plaintiff took a mortgage upon the whole east half of section 25. There was a house on one forty of it, in which it is conceded the defendant was living at the time. The mortgagee was thus put upon inquiry. When a party is placed upon inquiry, he is affected with notice of all the facts which inquiry would have elicited. If the mortgagee in this case had inquired of James Connelly by what right he occupied the forty acres on which he was living, he would have learned that he claimed to own the whole half section. Now the mortgagee is in precisely the same situation that he would have been in if he had made this inquiry and received the information. In fact he is in law presumed to have inquired, and obtained this information. The case is altogether different from one in which a party is visibly in possession of one forty of a section, without legal title, but is rightfully entitled to a conveyance for the whole section, and a person, without actual notice, buys, or takes a mortgage from the holder of the legal title upon a distinct forty of which there is no visible possession. For the reasons above set forth I concur in the conclusions of the foregoing opinion.

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ADAMS, J., dissenting.—We have a case where the defendant Daniel O. Connelly borrowed of the plaintiff \$4,500 and to secure it executed a mortgage upon a half section of land of which he had the legal title. But the mortgage was held invalid upon the ground that the mortgagor was merely the legal and not the equitable owner. The mortgagor it appears before the execution of the mortgage built a small house somewhere upon the half section and allowed his son, the defendant James O. Connelly, to occupy it. It appears also that this son James remained in his father's family for a few years after he became of age, and worked upon his father's farm, having his support from the income of the farm in the meantime. James' pretense is that when his father built a house on the half section in question and allowed him to occupy it he gave him the half section for his work, and there was some evidence introduced tending to show that such was the fact. The claim of James, if well grounded, convicts his father of a great fraud. He did not execute the mortgage by mistake. He was not a great land owner. He owned one section in a body, embracing the half section in question and must have known perfectly well what James' claims were when he executed the mortgage if those claims had any foundation.

There is much to show that they had no foundation. In the first place the evidence shows that at the time of the alleged settlement between James and his father for James' labor, his father gave him a considerable amount of personal property, and there is good reason to believe that that, together with the use of the house and so much of the half section as James saw fit to cultivate, was a full equivalent for James labor, and that what was said about the giving of the farm was said in view of a mere prospective advancement. Not a word appears to have been said about a deed at any time, though nine years elapsed between the time of the alleged settlement and the execution of the mortgage. Daniel O. Connelly paid the taxes on the land for the most part if

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not entirely, cultivated a part of it, and raised money by mortgaging the whole of it two or three times before he executed the mortgage in question. He was engaged in dealing in cattle, was considerably in debt, was not the owner of a large property, and does not appear to have been in circumstances to justify him in making so large an advancement to James. I must be permitted to express great doubt whether the mortgage was not executed in good faith, and without any supposition that James would make any claim to the land as against the mortgagee, and whether the mortgagor's fraud does not consist in now colluding with James to set up this claim.

I prefer, however, to place my dissent mainly upon other ground. If it should be conceded that James had the equitable title he would not be allowed to set it up as against the mortgagees unless the latter had actual notice of it. If they had known that James was living on the half section, knowledge of such fact, it may be conceded, would have been sufficient to put them upon inquiry, and in such case they would be deemed to have had actual knowledge of whatever there was reasonable ground for believing that the inquiry if properly prosecuted would have led to. But they had actual knowledge of nothing. They were not therefore put upon inquiry. The sole question then is as to whether they had constructive notice of anything, and if so what. They had constructive notice of whatever possession James is shown to have had when the mortgage was executed. We reach then the final and decisive question: What possession is James shown to have had when the mortgage was executed? He actually occupied the house, and so much of the ground as he was actually cultivating. But it is not shown precisely where the house was, nor what ground he was cultivating. Unless, then, his possession extended beyond his occupancy he must fail. My associates claim that it did. For the purposes of this opinion it may be conceded that where a person acquires the equitable title to a half section of land and occupies any

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part of it, he will be deemed to be in possession of the whole unless some other person is to be deemed in possession of the unoccupied part.

But in the case at bar I think it is to be deemed that Daniel O. Connelly was in possession of the unoccupied part. At the time of the alleged settlement with James his father was in possession of the whole section of which he had the title. The legal title to the section alone would have given him constructive possession, but he lived upon and had his farm upon the section. He had then what is to be deemed the actual possession of the whole. Now that actual possession must I think be deemed to have continued except so far as it was excluded by James' actual occupancy. In *Bradley v. West*, 60 Mo., 40, the court said: "Where the legal owner is in possession of part of the land of which he has the fee, the law invests him with the possession of the whole, and he can only be dispossessed by actual ouster, and a person entering upon the land not having the legal title will be restricted in his possession to the part actually occupied." It may be thought that the case is not applicable to this, because in this case the controversy is not between James and his father, and that his father must be deemed to have put James in possession of the whole. But the fact still remains that so far as anything was actually done, James was not put in possession of more than he actually occupied, and nothing was done to exclude the actual prior possession of the father of the part that was unoccupied.

In my opinion the decree should be reversed.

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1. **Former Adjudication: ASSIGNEE BOUND.** The assignee of a party bound by a former adjudication is also bound thereby.
2. **Decree: CONTROLS OPINION OF COURT.** When the decree of a court is at variance with the written opinion, the former controls and determines the rights of the parties.
3. **Former Adjudication: TEST OF.** When a former adjudication is relied on as a bar to an action, it must appear, either by the record or by extrinsic evidence, that the particular matter in controversy and sought to be concluded was necessarily tried and determined in the former action.
4. **— : — : RULE APPLIED.** In a former action the plaintiff demanded that the title to certain lands be quieted in him, or, if the defendant should be found to have the better title, that plaintiff should be reimbursed by defendant for taxes paid by plaintiff on the land, and, by agreement of parties, these propositions were specially submitted to the court; the court entered a decree dismissing plaintiff's bill as to the *lands*: *held* a dismissal and adjudication of both claims made by the plaintiff.
5. **— : NEW CAUSE OF ACTION.** An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is pronounced, but in every other where the right or title in controversy is the same, although the cause of action may be different.
6. **— : — : RULE APPLIED.** It was accordingly *held*, that a former adjudication in a suit to recover taxes paid on certain lands for certain years is conclusive in another suit between the same parties and their privies to recover taxes paid on the same land for subsequent years, when the payments for all the years were made in the same right, without any change in the relation of the parties or of the law governing their rights. *City of Davenport v. C., R. I. & P. R. Co.*, 38 Iowa, 633, distinguished.
7. **— : DISMISSAL WITHOUT PREJUDICE IN PART.** Where in the former action the bill was dismissed without prejudice as to a *part* of the lands, but the gross amount of taxes claimed to be recovered was agreed to have been paid on *all* the lands, *held*, an adjudication as to the recovery of the taxes paid on all the lands.

ON REHEARING.

1. **Former Adjudication: EFFECT OF.** A former adjudication estops a party or his privy from afterwards pleading anything which he might have pleaded in the former action.
2. **— : SUCCESSIVE CAUSES OF ACTION.** It is not essential that the successive causes of action should be the same, but when the very matter or thing which it is sought to litigate must have been adjudicated in the prior action, the bar or estoppel is complete.

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3. — : — : RULE APPLIED. It was accordingly *held*, that, when in an action to recover taxes paid on land for certain years, a particular question has been adjudicated, such adjudication will be conclusive on the parties and their privies in another action to recover taxes paid for subsequent years, when the subsequent payments were made under precisely the same claim of right and under the same circumstances as the former. ADAMS and DAY, JJ., *dissenting*.
4. Practice in Supreme Court: OBJECTION TOO LATE. After a cause has been submitted, determined, and a rehearing granted, it is too late to raise for the first time, in an argument for rehearing, the objection that a former adjudication of the question in issue is void for want of jurisdiction in the court rendering the former judgment.

Appeal from Webster Circuit Court.

THURSDAY, JULY 13.

THIS is an action in equity for the recovery of certain sums of money paid by the Iowa Homestead Company, the plaintiff's assignor, on account of taxes upon certain lands. The ownership of the lands was in dispute between the Homestead Company and the defendant Litchfield, and the taxes in question were paid during said controversy. The title to the land was finally determined to be in the defendant Litchfield. It is now claimed by the plaintiff that he, as assignee of the Homestead Company, should be reimbursed for the taxes so paid, because the same were paid with knowledge upon part of the defendant, and in pursuance of a statutory obligation resting upon said company to pay them.

The defenses are: *first*, that the payments were voluntary and with knowledge of the facts. *Second*, that the claim is barred by the statute of limitations except as to the taxes of 1871. *Third*, that the right to recover said taxes has been finally adjudicated; and *Fourth*, that the defendant was under no obligation to pay said taxes at the time they were paid by the Homestead Company, because of the adverse claim to the land set up by the State of Iowa and the United States, and that by reason thereof there is no obligation on the part of the defendant to reimburse the plaintiff. There was a

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trial upon the merits in the court below, and a decree was entered dismissing the petition. Plaintiff appeals.

George Crane, for appellant.

Wright, Gatch & Wright, for appellees.

ROTHROCK, J.—The lands upon which the taxes were paid are situated in Webster county, and the taxes in controversy were paid to the treasurer of that county. The county is made a party defendant, but as we understand the record, it is not claimed that the county is liable to the plaintiff. The relief prayed is that an account be taken of the amount of taxes that defendant should pay, and that a decree for the proper amount be entered up against the defendant in the name of the plaintiff, or in the name of Webster county, for the use and benefit of the plaintiff, and made a lien on the lands upon which the said taxes were paid. The actual controversy then is between the plaintiff and the defendant Litchfield, and the ultimate question to be determined is, should the defendant reimburse the plaintiff for the taxes so paid.

The case in its general features is similar to *Goodenow v. Moulton*, 51 Iowa, 555. Both involve reimbursement for taxes paid upon lands held by the same title, and if it were not for the defense of former adjudication we are unable to see why the decision in that case is not conclusive of this. Believing, however, that this case must be determined upon the question of former adjudication, and upon that alone, we will proceed at once to a consideration of that question.

It is proper to state in the outset that the plaintiff claims the right to recover as the assignee of the Homestead Company.

1. FORMER
adjudication: Being a mere assignee, if the claim was before the assignment settled by a final adjudication against the Homestead Company, the plaintiff cannot recover. It is claimed by the defendant that the claim now made was fully and finally adjudicated by the Supreme Court of the United States in the case of *Homestead Company v.*

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Valley R. R., 17 Wall., 153. To determine this question an examination of the record made in that case is necessary.

That action was commenced in the Webster District Court, in this State, in October, 1868. The substance of the petition was that the plaintiff therein, the Homestead Company, was the owner of certain described lands and that the defendant made some claim thereto. It was prayed that the title of the plaintiff might be quieted. One paragraph of the petition was as follows: "The said plaintiffs have been in possession of the lands claimed by them, themselves or their vendees in contract since 1861. They have paid the taxes thereon to the State of Iowa since, in all amounting to \$80,000, and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title who has not paid them." The following clause is in the prayer of the petition: "That in the event of the decree that the plaintiff's present title, or any part of it, has failed, that the said Des Moines Navigation and Railroad Company and its assignees may be decreed to repay to the plaintiff all the taxes which he has paid on said lands and interest thereon."

The answer in that action, among other averments, contains the following: "And this defendant further averring says: that as to whether or not the said complainant and its vendees have been in possession of, and paid taxes on the lands claimed by them since 1861, to the amount of \$80,000, this defendant is ignorant and uninformed, save by the said complainant's bill of complaint, but he expressly avers that the possession of the said lands by the said complainant and its vendees since 1861, is, and has been unauthorized and wrongful, and that the said complainant should be required to account for the use and rents and profits thereof, to the proper owners respectively, during the time they have been in such possession, and he expressly alleges and avers that all taxes whatever, paid by said complainant, have been paid by complainant voluntarily, with a knowledge of all the facts, and

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that the complainant is not entitled to have the same, or any part thereof refunded."

The cause having been transferred to the Circuit Court of the United States was submitted upon the evidence, among which was a stipulation in these words: "It is agreed that the only questions submitted on the hearing are:

"1st. In which of the parties is the paramount title in controversy?

"2d. If the title shall be adjudged to be in the defendant, the Des Moines Navigation and Railroad Company, is the plaintiff entitled to be reimbursed for taxes which it has paid on the lands?

"The amount of taxes is admitted to be \$2,000. If the court shall find that plaintiff is entitled to be reimbursed, the question of the amount to be reimbursed shall be referred to a master, and the defendant shall have a right to show any counter-claim or other matter which should be considered as reducing the amount to be reimbursed."

The decree of said court after reciting that the cause was "heard upon the bill and amendments, answers, replications, agreements of counsel, exhibits and depositions," concludes as follows:

"And thereupon, it was ordered, adjudged and decreed, that the plaintiff's bill as to the lands in townships 86, 87 and 88, ranges 27, 28, 29 and 30, east and west of the Des Moines River and south of the second correction line, and townships 89, 90, 91 and 92, ranges 28 and 29, east of the Des Moines River, and the bill for relief for indemnity lands in lieu thereof, be dismissed. And the bill for relief as to the lands in townships 89 and 90, north, range 28 and 29, west, on west side of Des Moines River, be dismissed without prejudice, and that the plaintiffs pay the costs."

The decree of the Supreme Court of the United States upon appeal was as follows: "This cause came on to be heard on the transcript of the record from the Circuit Court of the

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United States for the district of Iowa and was argued by counsel. On consideration whereof it is now here adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby affirmed with costs."

The defendant, Litchfield, was made a party defendant in the suit. He was then the owner of all the lands, the taxes upon which are now in controversy, and all of said lands were embraced in that action. It will thus be seen that the controversy in this action is between the same parties as that in the former suit.

In the opinion of the Supreme Court of the United States, it was distinctly held and determined that there could be no recovery by the plaintiff for the taxes paid. Counsel for appellant contends that the rights of the parties are to be determined by the decree, and as the decree is a simple affirmation of the decree of the Circuit Court, it follows that nothing was adjudicated but what was adjudicated by the Circuit Court. This position is not controverted by counsel for appellee, and we believe it to be well established that the judgment or decree of a court controls the written opinion, and if they are at variance the former controls and determines the rights of the parties. *Cooley v. Smith*, 17 Iowa, 99.

There is no contention between counsel for the respective parties as to the test by which to determine whether the matter in controversy has been adjudicated. The rule, as appears to be well stated by all the au-

^{a. FORMER ad-}
^{judication : test of.} thorities, is, that where a former judgment or decree is relied upon as a bar to an action it must appear either by the record or by extrinsic evidence that the particular matter in controversy and sought to be concluded was necessarily tried and determined in the former action. *Packet Company v. Sickles*, 5 Wallace, 580; *Wood v. Jackson*, 5 Wend., 10; *Miles v. Caldwell*, 2 Wall., 35. It is also

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conceded that the burden of establishing the plea of former adjudication is upon the defendant. Now, while there is no room for controversy as to the above rules of law, the difficulty in this case, as it is in many of the cases found in the books, consists in determining whether the facts rule applied. To bring the case in hand within these rules. To properly determine this we must not only consider the decree but the whole record in the case. This being done we find that the plaintiff demanded reimbursement for the taxes paid, in case it should be found that the defendant had the better title. This was properly joined with the other equitable demand claiming title to the land. It was not as claimed by counsel a mere legal claim of which a court of equity had no jurisdiction. To determine plaintiff's claim for taxes paid necessarily involved the taking of an account of the amount due thereon. The defendant by answer claimed title to the land and denied the right of the plaintiff to recover for taxes paid for the reasons set forth in the answer. The respective parties by their stipulation submitted to the court two propositions or issues: "1st, as to the title to the land; and 2d, as to the right to reimbursement for the taxes paid." The very question was by these proceedings submitted for the determination of the court, just the same as the question of title. It was not submitted by mere inference, but the court was required to determine it by the issues submitted and by the express agreement of the parties. It follows if that question was determined by the decree it was an end of the controversy between these parties, whether the decree was right or wrong. The decree, as will be seen, dismisses the plaintiff's bill as to the *lands*, describing them. What was the bill? It was a claim that the plaintiff had title to the lands, or if not the title, then an equitable demand for certain taxes paid upon it, and the dismissal as to the lands was a dismissal of both claims made by the plaintiff. It will not do to say that it was a dismissal as to the title only. The decree when

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it provides for a dismissal as to the land embraces all claims made in the bill upon the land or on account of the land, whether it be for title or reimbursement for taxes paid.

It is contended by counsel for appellant that the decree, if an adjudication at all, is only conclusive as to the taxes

s. —; new cause of action; rule applied. which had been paid prior to the commencement of the suit, in 1868. In other words that the

decrees is not an adjudication of the right to recover the taxes subsequently paid. The difficulty in maintaining this proposition is, that although the taxes in controversy were paid in the different years, the payment for all the years were made in the same right without any change of the relation of the parties, nor of the law governing their rights. In 2d Smith's Leading Cases, 789, it is said: "An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is announced, but in every other where the right or title is the same, although the cause of action may be different." In *Aurora v. Nest*, 7 Wall., 82, the adjudication relied upon was a judgment upon other coupons attached to the same bonds, and the court says: "It cannot be successfully denied that the cause of action in the former suit was the same as that in the pending suit, within the meaning of that requirement, as defined by cases of the highest authority. When the parties are the same, the legal effect of the former judgment as a bar is not impaired because the subject matter of the second suit is different, provided the second suit involves the same title and depends upon the same question." See, also, *Whittaker v. Johnson Co.*, 12 Iowa, 595. The case at bar appears to us to be fully within the rule of these authorities. The argument of the writer of the majority opinion in *The City of Davenport v. The C., R. I. & P. R. Co.*, 38 Iowa, 633, would seem to be contrary to the view herein expressed. But that case was a controversy between the taxing power to collect taxes levied in successive years, and it was held that a decree enjoining the collection of taxes levied in certain years was no bar to

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a recovery for levies in subsequent years. One ground upon which the decision was placed was that the taxes in controversy were levied under a different act of the legislature. That was a direct proceeding by the taxing power to collect its revenues, and it may be well questioned whether any decree could operate upon future assessments and levies. This is an action for an account to be taken of the amount of taxes paid by plaintiff upon defendant's land. Permitting the defense of former adjudication to prevail in this case in no way interferes with the taxing power, as it would have done in the case cited.

Lastly, it is urged that as to part of the land the bill was dismissed without prejudice, and as the only evidence introduced was the stipulation that the amount of taxes paid was \$2,000, there is no showing upon what part of the land the same was paid. It is claimed if it was paid on the land as to which the bill was dismissed without prejudice, there was no adjudication. But the plaintiff (the Homestead Company), averred payment of taxes upon "the lands" described in the petition, which means all the lands. And the stipulation recites generally that the amount of taxes paid was \$2,000. This leaves it to be plainly inferred that payment was made on all the lands.

We think the foregoing discussion disposes of all questions necessary to a disposition of this case, and we unite in the conclusion that the decree of the Circuit Court should be.

AFFIRMED.

ON REHEARING.

SEEVERS, CH. J.—I. On the petition of the plaintiff a rehearing was granted to the end we might again examine the question determined in the foregoing opinion. Such questions have been ably argued by counsel and in relation thereto we desire to say:

Previous to bringing the action referred to in the forgoing opinion, and reported in 17 Wall., 153, the plaintiff's assignor

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paid certain taxes on the lands in controversy in the action. If it was held the plaintiff in said action could not recover the lands, then as alternative relief the plaintiff asked judgment for the taxes so paid. The object of this action in part is to recover the same taxes, that is those paid before

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TION: effect
of.* bringing the former action. The right to recover is placed, as we think, on precisely the same grounds in this as in the former action. The

only allegation made now that was not made then is that the taxes were paid in good faith, under the belief the Homestead Company owned the land and was therefore legally bound to pay the taxes. But it is evident such good faith and belief must have existed when the payments were made, and if material such facts should have been alleged and established in the former action. The defense in such action was that said taxes had been voluntarily paid. This defense was sustained. The same defense is relied on now. As to the taxes paid before the commencement of the prior action the adjudication then must be regarded as an estoppel and bar to a recovery in this action.

While counsel for the plaintiff does not concede the correctness of the foregoing he earnestly contends such cannot be the rule as to the taxes paid subsequent to the former action. That question will now be considered.

II. The prior action was commenced in 1868 and was not determined by the Supreme Court of the United States until 1872. The plaintiff's assignor paid the taxes for the years 1868 to 1871 inclusive, and it is sought to recover the money so paid in this action. Counsel on both sides have cited a large number of cases as bearing upon the question as to what constitutes an adjudication that will estop the parties from again litigating the question determined in another action. There is no real conflict in the cases thus cited. The real difficulty is to ascertain whether the case is brought within the adjudicated cases and the rules established as to

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what constitutes an estoppel when a prior judgment is pleaded in bar.

Counsel for the plaintiff insist each payment of taxes for each year constitute a separate and distinct transaction or cause of action, and therefore an adjudication as to the taxes paid in one year cannot estop or have any bearing upon the right to recover for taxes paid in a subsequent year. It is said a levy of taxes must be made for each year and that as payments are made at different times and may be predicated on different and distinct rights, therefore the right to recover for one payment can in no manner be affected by an adjudication made as to some other year and payments. This, we think, may ordinarily be so, and in *The City of Davenport v. C., R. I. & P. R. Co.*, cited in the foregoing opinion, it was said in argument that taxes for each year constitute separate causes of action. It is conceded in the foregoing opinion this was in conflict with the views therein expressed. Reflection has satisfied us this concession should not have been made, for the reason no such conflict in fact exists.

It is undoubtedly true that the taxes of each year ordinarily constitute separate and distinct rights or causes of action. But where an action is brought to recover taxes paid in one year, and an action is afterward brought to recover for the taxes paid in a subsequent year, and the adjudication in the first is pleaded as a bar to the recovery in the second action, the question whether the estoppel is effectual will depend upon the issues in the two actions.

If the right to recover and defense thereto are based upon precisely the same ground, why litigate again the question that s. ____: has been determined. In such case the very successive causes of action right of the matter has been determined by a

court of competent jurisdiction. It is not essential the causes of action should be the same, but it is essential the right or title should be. That is, the issue in both actions and the matter on which the estoppel depends must

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be the same or substantially so. The very matter or thing which it is sought to litigate must have been adjudicated in the prior action. In such case the bar or estoppel is complete. This rule will not, we think, be disputed. Therefore authorities are not required in its support, but see *Merriam v. Whitemore*, 5 Gray, 316. No point is made in this, nor was there in the prior actions, that there was no assessment or levy of the taxes. Nor was there any question as to the payments made by the plaintiff's assignor in the former action, and there is none now as to the payments made for subsequent years. In fact in the former action and in this the right to recover is conceded, unless the payments were voluntary and therefore no recovery could be had. This identical question was determined by the Supreme Court of the

United States in the case cited in the foregoing
^{9. — : —} rule applied. opinion, that is, said court determined the payments made by the plaintiff's assignor were voluntary and therefore no recovery could be had. Now it will be conceded such adjudication had reference only to the taxes paid prior to 1868, and that plaintiff's assignor could not have recovered in the action the taxes subsequently paid.

But it conclusively appears, we think, the subsequent payments were made under the same claim of right as those previously made. There is no difference in the circumstances under which the payments were made as contemplated and adjudged by the Supreme Court of the United States. It was said by that court the right to recover was based on the ground the taxes were paid "in good faith and in ignorance of the law." That is all that is claimed as to the subsequent taxes. The very right of the present litigation has been determined by a court of competent jurisdiction and therefore it cannot be again litigated. Many cases may be supposed which have more or less bearing on the case at bar. But as to all of them it can justly be said, if the right and title upon which the right to recover depends has been put in issue, and been determined, the same right and title cannot be litig-

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gated again between the same parties in another action. But if the right and title has not been adjudicated then no bar or estoppel is created. It may be supposed in this case the Supreme Court of the United States might have held the payments made were not voluntary and a recovery could be had. Now, in an action between the same parties to recover taxes paid for subsequent years, the defendant could not have again litigated the question of voluntary payment, unless he could show the circumstances under which they were made were different from those under which the prior payments were made. So here, as has been said, all the payments were made under the same claim of right. It may possibly be claimed *Goodnow v. Moulton*, 51 Iowa, 555, is based on the thought the taxes were paid at the land owner's request. That there was no express request must be conceded. Now, it may be where taxes are paid because of such a request an adjudication that there could be no recovery for the taxes so paid would not bar a recovery for taxes paid for subsequent years under a similar request. But in the case at bar the request must be implied by law, and when this is attempted it is found the payments for each year were made under precisely the same circumstances, and that it has been adjudicated, no such request can be implied. It seems to us this must end the controversy, because the subject-matter or right to recover in both actions is precisely the same, and that is, can or will the law imply a request from the land-owner? We regret this result as in the absence of the estoppel we reached the conclusion the plaintiff was entitled to recover. *Goodnow v. Moulton*, 51 Iowa, 555.

III. The defendant filed a reply to the petition for a rehearing as contemplated by statute. The plaintiff could not <sup>10. PRACTICE
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late.</sup> as a matter of right file any further argument. Such an argument, however, was in fact filed in which for the first time it is suggested the Federal Courts did not have jurisdiction in the prior action, and therefore the adjudication pleaded as an estoppel is abso-

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lutely void. The defendant insists this point is made too late. With much force the defendant insists, as no such point was made below, the abstract was not prepared with reference to such question, and he insists there is matter of record below which will clearly show the Federal Courts had jurisdiction. The plaintiff attempts to meet this objection by putting as a part of a still later argument filed by him what he claims are the omitted portions of the record below. We feel constrained to hold that after a cause has been submitted, determined, and a rehearing granted, it is too late to raise for the first time such a vital question as that now made in an argument filed in aid of the petition for a rehearing, the same not being filed as a matter of right, but simply as a matter of grace and favor of the court. The former opinion is

ADHERED TO.

ADAMS, J., dissenting.—The circumstances under which the taxes were paid in this case were substantially the same as those under which the taxes were paid in *Goodnow v. Moulton*, 51 Iowa, 555. In that case a recovery for the payment was allowed upon the ground that the circumstances were such as to justify the court in holding that the payment was made at the land owner's request. The payments then in the case at bar were made at the land owner's request, and there is no question but that the plaintiff is entitled to recover unless he is barred by a prior adjudication. It is not to be denied that a claim was made in *Homestead Co. v. Valley R. R. Co.*, 17 Wall., 153, to recover for a portion of the payments, and through inadvertence or a mistaken view of the law the recovery was denied. So far as the recovery for those payments is concerned, however unfortunate it may be for the plaintiff, we feel obliged to hold that the prior adjudication constitutes a bar. But we are not obliged to hold, and this court does not hold, that whoever pays taxes for a land owner, at the land owner's request, cannot recover for such payment. The ruling of the Supreme Court of the

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United States upon such a question if wrong will not be followed by this court. See *Goodnow v. Moulton*, above cited. But the majority of this court does hold—and, in this, I think it commits a grave error—that where a person pays taxes for a land owner at his request, and brings an action to recover for the payment and recovery is denied, and afterwards the person pays other taxes for the land owner at his request and brings an action to recover for the second payment, recovery must be denied because recovery for the first payment was denied, and that too when it is conceded that the court erred in denying recovery for the first payment. The great learning and ability of the Supreme Court of the United States entitle its decisions to great weight and authority, but the effect of one of its decisions as a prior adjudication cannot be extended a hair's breadth beyond that of a like decision made by the lowest court known to the law. The case before us is not different from what it would be if the defendant had set up as a prior adjudication the decision of a justice of the peace. If a person should pay taxes for a land owner at his request and should bring an action to recover for the payment before a justice of the peace, and recovery should be denied, and afterward the person should pay other taxes for the land owner at his request, and bring an action to recover for the payment in the Circuit or District Court, and such court should hold that the action was barred by the adjudication in the former action, would this court sustain such a ruling? It seems clear that it would not. The reason is that there would be no common adjudicate fact or subject-matter. The only common point of adjudication would be the rule of law. But such adjudication does not constitute a prior adjudication in the sense in which the words are used as constituting a bar. Nor would the case be different if the taxes paid were taxes upon the same land. The payments would be absolutely distinct transactions and could not be more so, so far as any legal right is concerned, if the taxes first paid had been upon one tract of land and the

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taxes afterward paid had been upon a different tract. Suppose a person should perform labor for a land owner in harvesting grain upon certain land at the request of the land owner, but without any express agreement on the part of the land owner to pay for the labor, and the laborer should bring an action to recover for the labor, and a recovery should be denied on the ground that no implied agreement arose, or upon the ground that no recovery could be had upon an implied agreement, and the next year the laborer should perform like labor under like circumstances upon the same land, and bring an action to recover, would the decision in the former action constitute a prior adjudication, because the land was the same? Evidently not. Suppose a person should commit a trespass upon land by destroying the land owner's field of grain and the land owner should bring an action to recover the damages sustained and a recovery should be denied on the ground that the acts of the defendant did not constitute a tort, or on the ground that no recovery could be had for a tort, and the next year the defendant should destroy another field of grain of the same kind upon the same land, and the land owner should bring an action to recover, would the decision in the former action constitute a prior adjudication, because the land was the same? Evidently not. The title to the land not being drawn in question, there would be no common adjudicated fact or subject-matter. The only matter in controversy common to both actions would be the rule of law. So in the action at bar, and in the action, the decision in which is pleaded as a prior adjudication, there is no common fact or subject-matter. The title to the land is not in controversy. The payments were made in different years, and are of different taxes. The only matter in controversy common to both actions is the rule of law. A very large number of authorities are cited by counsel for the defendant; but in every one of them there was a common fact or common subject-matter drawn in controversy as distinguished from a mere rule of law. The majority cite one

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case, *Merriam v. Whittemore*, 5 Gray, 316. But in that case there was a common subject-matter drawn in controversy, and that was a certificate of discharge. In the former action it was held to be valid. In the second action between the same parties the validity of the identical certificate was drawn in issue again. The court very properly refused to make another adjudication respecting the certificate, and held the first adjudication conclusive. If an action should be brought to recover for interest on a promissory note, and the validity of the note should be drawn in issue and adjudicated, and afterward an action should be brought to recover the principal, it is manifest that as between the same parties the validity of the note could not be properly drawn in issue and adjudicated again. But an adjudication upon one promissory note would not necessarily be adjudication upon another, though of the same terms. It would be so only when the validity of the two notes depended upon a common fact as distinguished from a common rule of law.

In my opinion the plaintiff is entitled to recover for all payments made subsequent to the bringing of the first action and not embraced therein.

Mr. Justice DAY concurs with me in this dissent.

Everett v. The Union Pacific R. Co.

EVERETT v. THE UNION PACIFIC R. CO.

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1. **Witnesses: NUMBER OF LIMITED: DISCRETION OF COURT.** The trial court has a legal discretion to limit the number of witnesses that may be examined to establish a single point or proposition; and *held* that such discretion was not abused by the court in this case. BECK and ADAMS, JJ., *dissenting*.
2. **Damages: MEASURE OF: MARKETABLE VALUE: INSTRUCTION.** An instruction to the effect that the marketable value of property is the amount for which the property would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated, *held*, correct, and not necessarily calculated to raise the inference that a forced sale was meant by the court.
3. **Practice in Supreme Court: REJECTION OF EVIDENCE: ERROR MUST BE SHOWN.** Where evidence is rejected by the trial court this court will presume that it was properly rejected, unless the contrary affirmatively appears from the record.
4. **Evidence: VALUE OF LAND: TOO REMOTE.** Evidence that some land near by that in controversy was sold ten or twelve years before the trial at a certain price, *held* too remote to determine the value of the land in controversy at the time it was appropriated.
5. _____: _____. When the land in controversy might prudently be laid out in city lots, but in fact is not, evidence as to what its value would be if so laid out is incompetent.
6. **Practice in Supreme Court: VERDICT AGAINST EVIDENCE.** This court cannot say that a verdict should have been set aside as being against the evidence when the evidence is conflicting and is not all before the court.

Appeal from Pottawattamie District Court.

FRIDAY, JULY 14.

THIS is a proceeding instituted for the purpose of determining the damages sustained by the plaintiff, because of the appropriation by the defendant of certain real estate belonging to the plaintiff for the purposes of its road. The plaintiff appealed from the assessment made by the sheriff's jury to the Circuit Court. There was a transfer to the District Court where there was a trial by jury, which resulted in a verdict and judgment for the plaintiff and therefrom she appealed.

Everett v. The Union Pacific R. Co.

Scott & Hight, for appellant.

Wright & Baldwin, for appellee.

SEEVERS, CH. J.—I. After the jury was sworn, and when the plaintiff was about to introduce her evidence, the court announced “that each party would be limited to five witnesses on the question of the value of the property.” After introducing five witnesses the plaintiff asked leave to produce and examine other witnessess touching the value of the property. This was refused. To said rulings the plaintiff excepted and assigned the same as error. It was admitted of record that the quantity of land owned by the plaintiff was ten acres and that one acre thereof had been appropriated by the defendant.

In *Kesee v. C. & N. W. R. R. Co.*, 30 Iowa, 78, and *Bayes v. Herring*, 51 Id., 286, it was held the trial court had

1. WITNESSES: a legal discretion to limit the number of wit-
number lim-
ited : discre-
tion of court. nesses that might be examined to establish a sin-

gle point or proposition. Following these cases the only question is whether the discretion reposed in the court has been abused. There is no pretense the plaintiff was taken by surprise, unless it can be said because more than five witnesses were examined on a previous trial therefore the plaintiff had reason to believe the number would not be limited on the present trial in the court below. As the order was made before any witnesses were introduced, the plaintiff had the power of selecting those she desired to examine in compliance with the order. Therefore it cannot be said she was prejudicially surprised by the mere exercise of a discretion vested in the court.

At the previous trial there was no limit as to the number of witnesses that might be introduced, and we understand more than five were introduced on such trial by the plaintiff. The court, therefore, had knowledge what the witnessess had testified to, and the presumption must be indulged in the absence of any showing to the contrary their evidence would

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be the same on this as it had been on the former trial. The order, therefore, was advisedly made, and as it is not claimed the plaintiff sought to introduce witnesses who were not examined on the former trial, we cannot say the court abused its discretion. It is evident if there is a discretion the more fact it is exercised is not sufficient to show it has been abused.

II. It is urged the third, fourth and sixth paragraphs of the charge are erroneous. No exception was taken to the ~~2. DAMAGES:~~ fourth, nor has error been assigned in relation ~~measure of:~~ ~~instruction.~~ thereto. In the third paragraph it is said the court "assumed to explain the term 'marketable value' to be the amount for which the property would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated." The objection urged is the prominence given to "putting the property upon the market and selling it." It is said it was "calculated to impress upon an ordinary juror the idea of a forced sale in August, 1878." We do not think this is so, unless real estate was ordinarily so sold, and if it was, then the marketable value was the price it would bring at such sales. But we do not think the jury would or could infer that forced sales were meant by the court, but such as ordinarily occurred in the community where the property is situated. It is further said the instruction limits the sale of the property by the acre and the jury would not be authorized to estimate its value if laid off into lots. We do not concur in this view. We are unable to discover that any limit was fixed beyond which the jury should not go or that they were limited as to the manner of the sales except such as ordinarily occurred. Certainly there cannot be any other rule. The extraordinary or unusual cannot be regarded as rules by which human transactions or conduct can be squared. The instruction under consideration is not erroneous.

We have carefully examined the sixth paragraph of the charge in the light afforded by the argument of counsel, and

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we are unable to say it is erroneous. On the contrary, we think it correct and the legal thought well expressed. Counsel are mistaken in the assumption any facts are assumed. We do not deem it necessary to set out the instruction.

III. Several objections are urged to the admission and rejection of evidence. The most important will be briefly

<sup>3. PRACTICE
in supreme
court: error
must appear.</sup> considered. A witness was asked "State what you know about buildings being on the land around this tract or adjacent to it." This question was objected to and the objection sustained. The appellee insisted the land in question had not been laid out in city lots and that it should be valued as farming lands. The appellant insists the land was suitable and could be laid out into lots and sold as such, and this fact should enhance the value. Now, if adjoining or abutting land had been laid out into lots, sold as such, and buildings erected thereon, we are not prepared to say such evidence would not be admissible. But no such case is before us. "Around" or "adjacent to" are exceedingly indefinite when applied to the subject-matter of the present inquiry. And as the rule is error must affirmatively appear we cannot say the court erred, because we have no means of knowing where the lands about which the inquiry was made are situated. For aught we can know they may have been so distant that their improvement could not possibly have any bearing on the question before the jury.

A witness sold some land near that in controversy ten or twelve years before the trial, and the court ruled the price then obtained would not be competent evidence of the value of the land in question at the time it was appropriated. We think this ruling correct. The period when the transaction occurred was too remote.

Plaintiff asked a witness how many residence lots are ordinarily laid off or contained in an acre, and what this land, if <sup>4. EVIDENCE:
value of
land : too re-
mote.</sup> so laid off, would probably sell for per lot in the market. This evidence was, we think, properly rejected. It is said a prudent owner would lay

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the land out in lots and then sell it. Possibly this is so, but as it had not been so laid out when appropriated, the question was what it was worth in the condition it then was, and not what its prospective value was, or what it would be if it had been laid out into city lots.

The defendant asked a witness how another parcel of land compared in character and uniformity with the tract in question. To this the plaintiff objected, but the — : — same was overruled and the witness answered, there was a similarity in the two tracts. We are not sure we understand the point intended to be made, unless it is the witness's construction of similar was erroneous. But this could be inquired into on cross-examination and was a matter for the jury. We are unable to see any objection to the evidence or the prejudice that resulted therefrom. No objection is made that the respective tracts were not so situated that the character and uniformity of one would not be admissible as matter of comparison for the consideration of the jury.

IV. Accompanying a motion for a new trial there were affidavits tending to show that one of the jurors during, the deliberations of the jury, said in substance: "I do not care * * * for the evidence of the witnesses, or the charge of the court. I know what the damages are. They are not over fifty dollars." There were two of such affidavits. The implicated juror made an affidavit in which the language preceding that used by him is stated. Conceding this to be true, what was said by the juror is not seriously objectionable. The court must have believed the story told by the juror, or that conceding the affidavits filed by the plaintiff to be true, the verdict should not be set aside. We shall not discuss the last for the reason the first is sufficient. We are unwilling to set aside the verdict on the showing made. We strongly incline to think the affidavit made by the juror is true, and that the jurors filing the other affidavits either did not hear all that was said or have

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failed to state the connection in which the juror spoke the words objected to.

V. It is said the verdict is so manifestly against the evidence it is our duty to set it aside. It is conceded the evidence is conflicting. The sheriff's jury assessed the damages at \$200. It is said by counsel for appellant that according to the average of the plaintiff's evidence the verdict should have been for \$1,600, and if based on the evidence of defendant it should have been \$225. The verdict excluding interest was \$450. It is evident the jury did not base their verdict exclusively on what the witnesses of either party said. There was introduced as evidence by the plaintiff a map of Council Bluffs "showing the property in controversy and vicinity. This map showed, no doubt, how far the property in controversy was from the city of Council Bluffs, and the situation of the property in controversy, and that abutting thereon. This evidence would enable the jury to properly apply and test the evidence of the several witnesses and arrive at conclusions as to the weight to be given thereto.

This map no doubt was before the court when the motion for a new trial was overruled, but it is not before us. It is impossible for us to say the verdict is manifestly against the evidence when the evidence is not all before us.

AFFIRMED.

BECK, J., dissenting.—In *Keses v. The C. & N. W. R. Co.*, 30 Iowa, 78, two witnesses testified to facts which rendered impossible an act testified to by one witness introduced by the other party, and it was proposed to introduce two more witnesses to the facts testified to by the two who had given their evidence. The court below refused to hear the witnesses offered, on the ground that the evidence would lead to an unnecessary consumption of time. In *Bays v. Herring*, 51 Iowa, 286, the *nisi prius* court refused to hear the testimony of more than seven witnesses to impeach the reputation of a

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witness giving evidence in the case. It does not appear that any testimony was given in support of his reputation. The ruling in each case was sustained by this court. It cannot be doubted that the courts possess the power to arrest the introduction of testimony upon trials in proper cases.

There is no rule of the law arbitrarily limiting the number of witnesses which may be introduced in support of any issue, nor do the courts possess authority to adopt such a rule. The power to limit the number of witnesses can only be exercised to attain the ends of justice and prevent unreasonable delay by the unnecessary multiplication of proof. It may be exercised too in cases where it is apparent that the further introduction of evidence will throw no additional light upon the issues and will not serve to strengthen either side of the case.

The parties relied at the trial almost exclusively upon the opinions of witnesses as to the damage sustained by plaintiff in the appropriation of the land. It is very plain that the jury would be, as they ought to be, guided to a verdict by the number of the witnesses as well as their credibility and knowledge of the value of the land. If five equally credible and intelligent witnesses on each side should make contradictory statements, to satisfy the minds of the jurors other witnesses, if they may be found, ought to be introduced. It is no argument in support of the court's rulings to urge that the number of witnesses in this case could have been indefinitely increased, and that in the absence of the restriction great delay and expense would have been incurred. Courts and juries are provided by the law to administer justice though it may require time and great outlay of money. And it would have been time enough for the court below to exercise its power when it became really apparent that it was demanded by justice. Surely it cannot be said that five witnesses on a side is the precise limit which time and economy will prescribe for the trial of an issue which mainly depends upon the opinions of witnesses in regard to the value of city property. The parties could have shown the prices

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of actual sales of property in the vicinity of the land in question to establish its value. It is very plain that many witnesses may have been required to prove such sales.

But it may be said that the case had before been tried and the court was informed of the character of the evidence about to be offered. The court was informed of the nature of the evidence used upon the former trial. But the parties were not restricted to the same testimony in the second trial, nor were they required to advise the court of the character of the evidence they were about to offer.

Another thought supports the conclusion I have above expressed. The jury were required to base their finding as to their value of the property largely upon the opinions of witnesses. The parties being limited to five witnesses each, would select those entertaining the most extreme opinions in favor of the respective parties. A fair estimate of the value of the property is not attainable by considering alone the opinions of witnesses holding extreme views relating thereto. By permitting many to testify the jury would have had before them, it is probable, the testimony of persons less extravagant in their opinions as to the merits of the claims on either side of the case. They would have been aided thereby to find a true verdict.

Mr. Justice ADAMS concurs in this dissent and unites with me in the opinion that the judgment of this District Court ought to be reversed for error in limiting the number of witnesses of plaintiff to be examined upon the issue as to the value of the property.

Cook v. City of Burlington.

COOK ET AL., EXR'S, V. CITY OF BURLINGTON ET AL.

1. **Constitutional Law: TAXING POWER.** The legislature has the power under the Constitution to impose a tax upon the property of a toll-bridge company as the property of the corporation, and also to impose a tax on the shares of the corporation stock as the property of the stockholders.

ADAMS, J., *concurs* in the conclusion of the majority, but on the ground that, in this case, only a part of the corporation property was shown to have been assessed to the corporation, and that, therefore, the court below very properly held that upon the showing made the stock was not wholly exempt, no mere reduction of assessment having been asked.

55	251
86	31
59	251
109	589
59	251
137	38

Appeal from Des Moines Circuit Court.

FRIDAY, JULY 14.

THE plaintiffs are the executors of the estate of James W. Grimes, deceased. They are residents of the city of Burlington, where the estate is situated. Part of the estate consists of shares of stock in the Dunleith and Dubuque Bridge Co., which is a corporation of that name, incorporated under the general incorporation laws of the State of Iowa, and having its principal place of business in Dubuque county. The corporation owns a bridge across the Mississippi River, from the city of Dubuque, Iowa, to the eastern shore of the river in the State of Illinois, and said bridge is all the tangible property owned by the corporation. The bridge was assessed for taxation at Dubuque, and the taxes were paid. The shares of stock in the bridge company held and owned by the estate of Grimes, were also assessed for taxation for the same year at the city of Burlington. The plaintiffs claimed that the stock was not liable to taxation, and appealed from the board of equalization of the city of Burlington to the Circuit Court. Upon a trial in the Circuit Court it was held that the assessment of the stock was authorized by law, and plaintiffs appeal.

Cook v. City of Burlington.

Hedge and Blythe, Shiras, Van Duzee and Henderson,
for appellants.

O. L. Poor, for appellee.

ROTHROCK, J.—The assessment of the bridge as the property of the corporation was authorized by law. *Appeal of The Des Moines Water Company*, 48 Iowa, 324. Whether the shares of stock can be legally assessed and taxed as the property of the stockholders for the same year for which the property of the corporation is assessed and taxed was not determined in that case. It was said, however, that "the statute provides that the stock of such corporations shall be assessed at its cash value. When assessed and taxed under the statute, stock must be taxed as the property of the respective owners, and there is no provision making the corporation liable therefor."

We have then the question in this case whether the shares of stock may be taxed in addition to the taxation of the property of the corporation.

And we may say, once for all, at the outset, that our views, as expressed in the case just cited, that the statute provides that the stock shall be assessed and taxed, remains unchanged. This conclusion is not founded upon any doubtful construction of the statute, but upon its plain, certain and unequivocal language and meaning. The statute imposing this burden upon the stock is found in section 813 of the Code, and is as follows: "Depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value,
* * * *."

It is idle to contend in the face of this plain and explicit language that the legislature has not required that stock in corporations shall be assessed, and the only question now for determination is, does the legislature have the power to determine that the property of a corporation and the stock shall both be taxed.

Counsel for appellants contend that no such power exists,

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because it is duplicate or double taxation of the same property, and it is insisted that "this court has over and over again declared that double taxation is forbidden by our Constitution." If this statement were correct, and we should concede that the question here presented were one of duplicate taxation, the case could easily and speedily be disposed of by a prompt reversal. But, while it is true that this court in *Tallman v. Butler County*, 12 Iowa, 534, said that it "is neither the policy nor the justice of the law to tolerate double taxation," and in *U. S. Express Co. v. Ellyson*, 28 Id., 378, that "double taxation would be so unjust as to excite disfavor of both courts and legislature," and in *McGregor's Executors v. Vanpel*, 24 Id., 436, that mortgages upon real estate should be held to be taxable "unless this will lead to double taxation," yet it never has been held in this State, that what is denominated duplicate taxation is in excess of the legislative power. The most that can be said of these utterances of this court is, that it should be held in disfavor by courts and legislatures.

In Cooley on Taxation, 165, it is said: "It has properly and justly been held that a construction of the laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute or by necessary implication."

Upon the question as to whether the imposition of taxes upon the property of a corporation and upon the shares of stock in the hands of stockholders, the general observations upon the subject of duplicate taxation found in Cooley on Taxation, page 159, seem to us to be appropriate to be here quoted. It is there said: "A system of indirect taxes, combined with a system of general taxation by value, must often have the effect to duplicate the burden upon some species of property or upon some persons, and the taxation of stockholders of a corporation and also of the corporation itself, must sometimes produce a like result. There is also, sometimes, what seems to be double taxation of the same property to

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two individuals, as where the purchaser of property on credit is taxed on its full value while the seller is taxed to the same amount on the debt. * * * *. Now, whether there is injustice in the taxation, in every instance in which it can be shown that one individual, who has been directly taxed his due proportion, is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results."

It must be conceded that the taxation of the property of the corporation and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A, and again to B. That would be a double taxation, which we suppose would not be allowable in any State in the Union. It would be a direct discrimination and inequality in the exercise of the taxing power, which would impose a greater burden upon one citizen than upon another upon the same kind of property. But the case at bar is quite different. The corporation is a person distinct from the stockholder. It is true, it is what is denominated an artificial person, and may be said to be ideal and intangible. But that it is a person in law is the first principle learned by the student in opening any book on corporations. Its stockholders are distinct and different persons. They are usually not liable for its debts, and have no right to the enjoyment or possession of its property during the period of its duration or until it be dissolved by some procedure known to the law. The stockholder is entitled to dividends upon his stock, if there be any dividends, and the value of his stock depends upon prospective dividends, and the dividends depend upon the net earnings of the corporation. If the bridge in this case be taxed, the tax must be paid from the income, and this reduces the value of the stock, so that there is no duplicate taxation, so far at least as the tax upon the bridge reduces the value of the stock.

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In *McGregor's Exec'r's v. Vanpel, supra*, this court held that a mortgage given to secure the payment of the purchase-money of the premises mortgaged is not exempt from taxation. In that case it is said that "a system of assessments operating with entire equality and with absolute justice is a desideratum in government yet unattained, and perhaps unattainable." And in *Finley v. Philadelphia*, 32 Pa. St., 381, it is said: "There is nothing poetical about tax laws, whenever they find property they claim contribution for its protection without any special respect to the owner or his occupation."

The best devised system of taxation based upon the values of property must, of necessity, produce unequal results, so long as the attempt is made to tax all property including real estate, personal chattels, and moneys and credits. One person will be taxed upon the real estate bought upon credit, and another upon the obligation which he holds for the purchase-money. And this must necessarily be so or there would be but little taxation upon credits, because, for the most part, they are either the representative of money or property of some kind held by another. If as is said in Cooley on Taxation, p. 100, "all the property in a town is sold on credit and the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders." And yet under the system of taxation adopted by the State of Iowa, it cannot be claimed that the assessor must inquire of the owner of promissory notes, or mortgages, whether they are credits for taxable property which has been sold by the holder of these credits.

In the case at bar the stockholders paid to the corporation a certain sum of money. The corporation used this money in the construction of a toll-bridge from which the corporation derived an income. The agreement between the contracting parties is that the corporation is to manage and control the bridge, make the necessary repairs, and pay the taxes assessed against the bridge, and after deducting these legiti-

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mate and necessary expenses pay to the stockholder his proportionate share of the net earnings, and upon the dissolution of the corporation the stockholder is to be repaid his money advanced from the property belonging to the dead corporation. Now, suppose this very contract were made with a natural person instead of a corporation, and the stockholder or creditor should make a claim that the obligation held by him was not taxable. There would be no more grounds for such claim under our system of taxation than there would be for the claim that if A loans B \$100, which is invested in merchandise, the debt is not taxable because the merchandise is taxable.

These illustrations, it appears to us, demonstrate that if we were to determine that the legislature has no constitutional power to impose this tax upon the stockholder, it would open a door into a sea of trouble in the administration of the revenue laws of the State.

In disposing of this important question we have not reviewed the authorities cited by the respective counsel of the parties. It is sufficient to say that these views are supported by the very great majority of adjudged cases upon this subject. We think the Circuit Court correctly determined that the shares of stock are taxable. And if the public interests of this State require that either the property of a corporation of this character, or the stock therein be exempt from taxation, that relief must come from the law-making power. It will be understood that the decision in this case will have no application to capital stock in manufacturing companies. By chapter 57 of the laws of 1880 such stock is exempt from assessment and taxation.

AFFIRMED.

ADAMS, J.—I concur in the result reached in this case, but not in the ground upon which it is reached. The general question decided by the majority, while it is the only question argued by counsel, does not, it appears to me, properly

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arise from the record, and could not properly have been decided by the court below.

The appellants, in maintaining that the stock is not liable to taxation, contend that it is not for the reason that the property of the corporation had been taxed to the corporation in Iowa, and that the taxation of the stock under the same sovereignty would be double taxation, and not allowable. The majority hold that such taxation would not be double taxation in such sense that it is not allowable. Upon this question I do not feel called upon to express any opinion. A part of the bridge is in the State of Illinois and not taxable in Iowa. *Dunleith & Dubuque Bridge Co. v. Dubuque County*, 55 Iowa, 564. It is true, one witness testified that "the taxes on the bridge had been assessed at Dubuque and paid in Dubuque county." But I cannot presume that the witness meant that any more of the bridge was taxed at Dubuque than was taxable there. Besides, if taxes had been collected in Dubuque county upon Illinois property, it would be by reason of a mistake, which would be subject to rectification.

We have then a case where a portion only of the property of a corporation is shown to have been taxed to the corporation. This is not sufficient to justify us in holding that the stock is wholly exempt as appellants contend. The court below very properly held that the stock upon the showing made was not wholly exempt. No mere reduction of assessment was asked, and no allusion appears to have been made to such a question. The ruling, then, could not properly have been different if it should be conceded that where all the property of an Iowa corporation is in Iowa and has been taxed in Iowa, the stock of such corporation would be exempt.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
COUNCIL BLUFFS, SEPTEMBER TERM, A. D. 1882.

IN THE THIRTY-SIXTH YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS, } JUDGES.

59	256
96	396
96	412

LEASMAN v. NICHOLSON, Ex'r.

59	256
116	505
59	259

1134 277

1. **Evidence: ADMINISTRATOR: STATUTE CONSTRUED.** Section 3639 of the Code does not prohibit a witness, introduced by the executor himself, from testifying in favor of the executor as to a personal transaction between the witness and the decedent, even though the witness may be personally interested in the event of the suit.

On REHEARING, held further, that the word "against," in the phrase "against the executor" in the statute, refers to *testimony* against the executor and not to *actions* against him; and that the disqualification of the statute applies alike to actions brought by and against the executor, but only to witnesses introduced to testify against the executor.

Leasman v. Nicholson, E'xr.

2. ——: IN LAW ACTIONS TRIED TO COURT. When an action not triable *de novo* in the Supreme Court is tried to the court below without a jury, and evidence is improperly admitted against objection, it must be presumed that the court considered such evidence, and its admission will be ground for reversal.

Appeal from Madison Circuit Court

TUESDAY, SEPTEMBER 19.

ACTION upon a promissory note alleged to have been executed to the plaintiff by defendant's testatrix, Jane Bardick. The defendant for answer denied that his testatrix executed the note. There was a trial without a jury, and judgment was rendered for the defendant. The plaintiff appeals.

McCaughan & Dabney, for appellant.

Gilpin & Gilpin, for appellee.

ADAMS, J.—I. The name of the testatrix was signed to the note by one Nichols. He was introduced as a witness, and testified that he signed her name to the note by her request, and that she then took the note and made her mark. He also testified that the note was given for borrowed money.

To maintain the issue upon the defendant's part he introduced as a witness one Mrs. Henry, a daughter of the testatrix and a legatee. Her testimony was to the effect that she was intimately acquainted with her mother's affairs and mode of doing business; that she lived at home with her mother, and was invariably consulted by her in her business transactions; that her mother had no occasion to borrow money, and did not borrow any nor execute the note in question so far as she knew. This testimony was admitted against the plaintiff's objections and the admission of it is assigned as error.

The only objection urged in argument is that the testimony was inadmissible under section 3639 of the Code. But

Leasman v. Nicholson, Ex'r.

in our opinion the position is not well taken. Without stopping to consider whether it sufficiently appears that the witness was interested in the event of the suit, or whether the testimony given pertained to a personal transaction between the testatrix and plaintiff, we think it is sufficient to say that the witness was introduced by the executor himself, and that the testimony was in his favor and not *against* him. It is very clear that the provision of the Code above cited does not apply.

II. One Feeley was introduced as a witness who was allowed to testify that at a time, which was nearly a year before the testatrix's death, and five days before the alleged execution of the note in suit, he heard her state that she owed nothing. The admission of this evidence is assigned as error.

No effort is made by the appellee to point out any ground upon which the admission of the evidence can be sustained, and we are not able to discover any, nor can we say that it was without prejudice. It was introduced probably for the purpose of corroborating Mrs. Henry, who testified that her mother, the testatrix, had no occasion to borrow money, and did not so far as she knew borrow any. Possibly it was allowed to show the fact, if such was the fact, that the testatrix was not indebted, as a slight circumstance tending to show that she did not borrow the money and give the note in suit therefor as alleged. But conceding that it was allowed to show that fact, we cannot think that it was allowable to show it by showing the statement of the testatrix.

The defendant's position, if we understand it, is that we cannot presume that Feeley's testimony was considered by the court, and that if it was inadmissible, we must presume that the court did not consider it.

As, however, the court admitted it over the objection of the plaintiff, we must presume that the court did consider it. *Johnson v. Harder & Avery*, 45 Iowa, 680. This is an action at law, triable on appeal upon exceptions. Evidence

Leasman v. Nicholson, Ex't.

improperly admitted and excepted to constitutes a ground of reversal as much as if the case had been tried to a jury.

If we could see that the evidence could be rejected, and still no other conclusion be reached, we might affirm on that ground. But the evidence is conflicting, and we are by no means certain that there is not a preponderance in favor of the plaintiff.

We think that the judgment must be

REVERSED.

SUPPLEMENTAL OPINION.

The appellant, notwithstanding the case was reversed, asks a rehearing upon one point, which was decided adversely to him. He objected to the testimony of one Mrs. Henry, and we held that the objection was not well taken. He now asks us to review our ruling upon this point. We have accordingly done so, and we have to say that it appears to us that the ruling is correct, and that the petition for a rehearing must be overruled.

The question presented, however, appears to call for a somewhat fuller discussion than we gave it, and we add a few words.

Before proceeding to its consideration we will say that we do not wish to be understood as holding that the testimony of Mrs. Henry was admissible. We merely hold that it was not inadmissible by reason of the objection urged. That objection is that Mrs. Henry was interested in the event of the suit, and not competent to testify to a personal transaction or communication between her and the testatrix, even though examined in behalf of the executor. The objection was made under section 3639 of the Code. The plaintiff insists that it was not material that she was examined in behalf of the executor. He contends that where an action is brought against an executor, an interested person should not be permitted to testify at all respecting a personal transaction or communication between such person and the decedent.

Leasman v. Nicholson, Ex'r.

As interest does not disqualify except as expressly provided, and as the only statute relied upon as so providing is the section of the Code above cited, we have to construe that section. The portion of the section in question is in these words: "No party to any action or proceeding, nor any person interested in the event thereof * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane or lunatic, against the executor * * * of such deceased person or assignee or guardian of such insane person or lunatic." The question presented, is as to what the word "against" used in the statute shows the relation between. The plaintiff insists that it shows the relation between the words "actions" and "proceeding" on the one hand, and the words "executor," "assignee," and "guardian" on the other. According to his construction, the disqualification is not intended to apply in actions brought *by* an executor, assignor, or guardian, but only in actions brought *against* an executor, assignee or guardian; and in the latter, it applies as well where the witness is examined in behalf of the executor, etc., as against him. According to the construction which we adopt, the disqualification applies in both classes of cases, but only where the witness is examined *against* the executor. This construction is without question the more natural one, grammatically considered, and we see nothing in the reason or policy of the law that calls for the other. Where a person has had a personal transaction with another who has died, and an action is brought by, or against, his executor involving such transaction, every one can see why the person who had such transaction with the decedent should not be allowed to testify against the executor, if he is interested in the event of the suit. The other party to the transaction being dead cannot testify in rebuttal. Now the objection to allowing such a witness to testify to such a transaction is just as great where the action is brought by the executor as where it is

The State v. McIntire.

brought *against* him. The mouth of the decedent is just as effectually closed where the executor is plaintiff as where he is defendant.

It may be thought that the witness should have been held incompetent to testify, on the ground that the plaintiff being a party, was incompetent to testify in rebuttal. But the mere fact that he was a party did not render him incompetent. He was incompetent only in case the transaction or communication personal as between Mrs. Henry and the decedent was also a transaction or communication personal as between the plaintiff and decedent, but this could not be.

The objections urged to the construction adopted appear to us to have but little weight, while the objections to the construction contended for appear to us to be insuperable.

THE STATE v. MCINTIRE.

1. **Indictment: omission of title: statute construed.** It is not a valid objection to an indictment that on the face of it there is no title to the action and that the names of the parties are not set forth in such title as prescribed by the form given in section 4297 of the Code.
2. — : **BURGLARY: ALLEGATION OF OWNERSHIP: STATUTE CONSTRUED.** Under Code, section 4203, and subdivision six, section 4305, in an indictment for burglary, it is a sufficient designation of the person injured to allege that the owner of the property is to the jurors unknown, and the charge that the car broken was in the possession, care, control and custody of the C., B. & Q. Railroad Company, is an averment that said company had a special property in the car, and was sufficient to allege the offense as against that company.
3. **Practice in the Supreme Court: court limited by record.** This court cannot consider an objection when the record does not contain the facts necessary for its determination.

Appeal from Henry District Court.

TUESDAY, SEPTEMBER 19.

THE defendant was indicted jointly with one Eply upon a charge of feloniously breaking and entering a railroad car

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with intent to steal certain property therefrom. Upon a trial a verdict of guilty was found upon which judgment was entered. Defendant appeals.

Culbertson & Jones and *L.A. Palmer*, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. The charging part of the indictment is as follows:

“That Geo. Eply and Daniel McIntire, on the 12th day of May, 1880, in the county of Henry, and State of Iowa, aforesaid, unlawfully, feloniously and burglariously, did break and enter a railroad car in the possession, care, control and custody of the Chicago, Burlington & Quincy Railroad Company, a corporation doing business under the laws of Iowa, the owners of said car being to the jurors unknown, in which said railroad car, goods, merchandise and other valuable things were kept for use, sale and deposit, with the felonious intent the said goods, merchandise and other valuable things, then and there, being found feloniously, to take, steal, and carry away, contrary to the form of the statute, etc.

“T. A. BEREMAN, *District Attorney.*”

There was a motion to set aside the indictment, and a demurrer thereto, and a motion for a new trial all of which were overruled. It is claimed these rulings are erroneous because the indictment is insufficient, there being no title to the action on the face of the indictment as required by the form prescribed by section 4297 of the Code, and for the further reason that the names of the parties are not set forth as required by said form. In answer to these objections it is sufficient to say that the statute makes no requirement that the form therein given shall be literally followed. And it is not a valid objection to an indictment that the name of the offense is omitted or wrongly stated. *State v. Hessenkamp*, 17 Iowa, 25; *Same v. Buldy*, 17 Iowa, 39; *Same v. Shaw*, 35 Iowa, 575; *Same v. Davis*, 41 Iowa, 311.

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The objection that the names of the parties are not set forth in the title of the action, is also without merit. The body of the indictment fully sets forth the names of the parties charged and by what authority charged.

II. It is further claimed that the indictment is insufficient, because it avers that the car which was feloniously broken and entered was owned by some persons "to the jurors unknown." This is the usual averment where the name of a person injured in person or property is unknown to the grand jury, and there can be no doubt such an averment is sufficient, especially under our statute, which provides that an erroneous allegation as to the name of the person injured is not material. Code, § 4302, and subdivision six of § 4305.

Besides, the indictment in this case charges that the car in question was in the "possession, care, control and custody of the Chicago, Burlington and Quincy Railroad Company." This is an averment that the railroad company had a special property in the car, and it was sufficient to allege the offense as against that company. *State v. Golden*, 49 Iowa, 48; *Bruley v. Rose*, 57 Iowa, 651.

III. It was further objected that the grand jury was not drawn, summoned and impaneled according to law, and that defendant had no opportunity to challenge the grand jury. We cannot consider these objections, because the record before us does not contain any of the facts necessary to their determination.

AFFIRMED.

State v. McIntire.

STATE V. McINTIRE.

1. **Indictment: MANNER OF PRESENTMENT: PRESUMPTION OF REGULARITY.** When the objection is raised to an indictment that it was not presented in the manner prescribed by the Code, it will be presumed, in the absence of a showing in the record to the contrary, that the requirements of the statute were complied with.
2. **—: OMISSION OF TITLE NOT FATAL: STATUTE CONSTRUED.** An indictment will not be set aside because it does not contain the title of the cause and the names of the parties, as prescribed by Code, § 4297.
3. **—: LARCENY: ALLEGATION OF OWNERSHIP: STATUTE CONSTRUED.** Under section 4305, par. 6, of the Code, in an indictment for larceny, it is a sufficient designation of the person injured to allege that the owner of the stolen property is to the jurors unknown; and the allegation that the goods were taken from the possession of the railroad company is sufficient, as showing special property in the company, to designate the person injured by the crime.

Appeal from Henry District Court.

TUESDAY, SEPTEMBER 19.

DEFENDANT was indicted and convicted of larceny; he now appeals to this court.

Culbertson & Jones and L. A. Palmer, for appellant.

Smith McPherson Attorney-general, for the State.

BECK, J.—I. This cause was submitted for decision without argument on the part of defendant. The indictment and proceedings had thereon are set out in the abstract upon which the case was tried in this court as follows:

“INDICTMENT.

“**STATE OF IOWA,** } *District Court of Said County.*
 Henry County. }

“At the August term thereof, A. D. 1880, the grand jury within and for the body of the county of Henry as aforesaid,

State v. McIntire.

duly and legally convoked, impaneled, and sworn in the name and by the authority of the State of Iowa, upon their oaths, do find and present:

"That George Eply and Daniel McIntyre, on the 12th day of May, 1880, in the county of Henry, and the State of Iowa, aforesaid, from the possession of the Chicago, Burlington and Quincy Railroad Company, a corporation doing business under the laws of Iowa, ninety yards of sheeting of the value of ten dollars, one box of shoes of the value of fifty dollars, and three pair of boots of the value of seven and fifty one-hundredth dollars, all to the value of sixty-seven and fifty one-hundredth dollars, the owner or owners of said chattels being to the jurors unknown, feloniously did take, steal, and carry away, contrary to the statute, etc.

"PROCEEDINGS.

"On the 25th day of August, 1880, the defendant filed a motion to set aside the indictment, setting up the following grounds:

"1st. That the indictment was not presented as prescribed by the Code.

"2d. The presentment is faulty in this, that it does not comply with the Code requiring the title of the case and the names of the parties to appear on the face of the indictment.

"This motion the court overruled, to which ruling of the court the defendant at the time excepted.

"The defendant then on the 25th day of August, 1880, filed a demurrer, setting up the following grounds:

"1st. The indictment does not conform to the requirements of the Code, in this, that it does not contain the title of the cause and the names of the parties, and is not a compliance with the form in section No. 4297 of the Code.

"2d. It is not sufficient in this, that it does not comply with subdivision 6, of section 4305. It is not a compliance with this section to say "that the owners of the goods were unknown to the jurors;" it must also charge specifically that the goods and chattels were *not* the defendant's.

State v. McIntire.

"3d. That in failing to state that the property alleged to have been taken from the car was *not* the property of defendant, it raises a presumption that such property was the property of the defendant and that the taking was *not* criminal.

"This demurrer was also overruled by the court, to which the defendant at the time excepted.

"Trial was had to a jury, at November, 1880, term, who found a verdict of guilty as charged in the indictment;

"Upon which verdict the court entered judgment, sentencing defendant eighteen months to the penitentiary.

"On the 27th day of November, 1880, defendant filed a motion to arrest the judgment and for a new trial, which was overruled. To which ruling the defendant at the time excepted.

"The points raised in the motion in arrest and for a new trial were the same as those raised in the demurrer herein."

The rulings of the District Court upon the motion to set aside the indictment upon the demurrer, and upon the motion in arrest and for a new trial, are assigned for error by defendant's counsel.

II. The facts upon which the first ground of the motion was based are not shown by the record. It does not appear that the indictment was not presented in the manner prescribed by the Code. In the absence of an affirmative showing to the contrary it will be presumed that the requirements of the statute were complied with.

III. The other grounds of the motion are repeated in the demurrer. The first one is that the indictment does not contain the title of the cause and the names of the parties as prescribed by Code, § 4297. The form given in this section designates the offense charged by name. It was held in *State v. Davis*, 41 Iowa, 311, that an erroneous designation of the crime did not defeat the indictment and that the offense would be determined by the facts alleged. The erroneous designation was held to be surplusage and the indictment,

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therefore, was regarded as containing no designation of the crime. And in *State v. Baldy*, 17 Iowa, 39; *State v. Shaw*, 35, Iowa, 575, and *State v. Hessenkamp*, 17 Iowa, 25, indictments were held to be good which failed to designate the offenses. Under the rule recognized in these cases the omission of the title of the cause from the indictment is not a fatal objection.

IV. The indictment is assailed in the demurrer and in the motion in arrest, on the ground that it fails to allege the name of the owners of the property stolen.

Code, § 4305, ¶ 6, requires "that when material, the name of the person injured be set forth when known to the grand jury, or if not known to it, that it be so stated in the indictment."

Regarding the owner of the goods to be the party injured the indictment is sufficient as it alleges he is unknown to the grand jurors.

The indictment alleges that the goods were in the possession of the railroad company therein named. If this be regarded as showing special property in that corporation, it is a sufficient designation of the party injured by the crime.

The indictment unmistakably shows that the goods stolen were not the property of defendant.

The *State v. McIntire, supra* (decided at the present term of this court), is in harmony with this opinion.

AFFIRMED.

State v. Pierson.

STATE v. PIERSON.

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1. **Indictment: LARCENY OF BANK CHECK: ALLEGATION OF VALUE.** In an indictment for the larceny of a bank check, it is a sufficient allegation of its value to say that it was "of the value of \$20.97," that being equivalent to saying that the instrument called for at least that amount of money. Code, § 3914.
2. _____ : _____: **DESCRIPTION OF PROPERTY.** In such indictment the stolen property need not be described with any more particularity than any other stolen property; and it was sufficient in this case to describe the property as a check or order for the payment of money, stating by whom signed, where payable, date, owner and value.

Appeal from Des Moines District Court.

TUESDAY, SEPTEMBER 19.

THE defendant was indicted, tried and convicted upon a charge of stealing a bank check, and he appeals.

T. B. Snyder and John Greiner, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—The charging part of the indictment is as follows: "That Ole Pierson on the 17th day of June, 1881, at Des Moines county and state aforesaid, a bill of exchange to-wit, an order for the payment of money, purporting to be signed by C. S. Bartlett, and payable at the Union National Bank at Chicago, Illinois, and of date of the 6th day of June, 1881, and of the property, goods and chattels" of one Nels Vorene, and of the value of \$20 97-100, feloniously did take, steal and carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Iowa." Upon the return of the verdict the defendant filed a motion in arrest of judgment, which was in these words:

"1. That no crime was charged against him in the indictment.

State v. Pierson.

“2. That the indictment does not aver or charge that any money was due on the bill of exchange, bank check, or order for the payment of money claimed to have been the subject of the larceny, or secured thereby and remaining unsatisfied or unpaid.

“3. That the indictment does not charge that the bill of exchange, bank check or order for the payment of money charged to have been the subject of the larceny, was for the payment of any particular or definite sum of money.

“4. That the indictment does not charge any facts showing the bill of exchange, bank check, or order for the payment of money charged to have been stolen, to have been of any value whatever.

“5. That the indictment does not charge the bill of exchange, bank check, or order for the payment of money charged to have been the subject of the larceny, to have been payable to any person.

“6. That the indictment is vague, uncertain and insufficient.”

The overruling of this motion is made the only ground of complaint upon this appeal. The stealing of bank notes, promissory notes, orders or certificates, is made larceny by section 3902 of the Code, and by section 3914 it is provided that the money due on any such instrument, or secured thereby, and remaining unsatisfied, shall be adjudged the value thereof, if stolen.

The allegation of the value of the check must therefore be equivalent to an allegation that the instrument called for at least that amount of money. But whether this be correct or not, we are clearly of the opinion that under our practice this indictment is sufficient. There is no requirement that in an indictment for the larceny of an instrument in writing, the property shall be any more particularly described than any other stolen property. We have in this indictment a charge that the defendant stole an order or bank check for the payment of money, naming its date, owner and place of

State v. Kaufman.

payment, and an allegation of its value. There is no more reason for requiring any more particular description of the stolen property than there would be to require that an indictment for the larceny of a horse should describe the animal by color, age and marks and brands. The motion in arrest of judgment was correctly overruled.

AFFIRMED.

STATE v. KAUFMAN.

1. **Indictment: SUFFICIENCY OF: GAMBLING.** An indictment charging that the defendant "did keep a house, shop and place under his care and control, in which said house, shop and place, he did permit and suffer divers persons, to the jurors unknown, to play at cards, dice, dominoes, and other games for money, cigars, beer, and other things, contrary to the form of the statute, etc., held sufficient under section 4026 of the Code; following *State v. Cure*, 7 Iowa, 479; *State v. Cooster*, 10 Iowa, 452; and *State v. Middleton*, 11 Iowa, 246.

Appeal from Henry District Court.

TUESDAY, SEPTEMBER 19.

INDICTMENT for permitting gambling. A demurrer to the indictment was overruled and judgment was rendered against the defendant, and he appeals.

No appearance for appellant.

Smith McPherson, Attorney-general, for appellee.

SKEVERS, CH. J.—The indictment charges that the defendant "Did keep a house, shop and place under his care and control, in which said house, shop and place, said Jacob Kaufman, did permit and suffer divers persons, to the jurors unknown, to play at cards, dice, dominoes and other games for money, cigars, beer and other things, contrary to the form

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of the statute in such case provided, and against the peace and dignity of the State of Iowa." The statute provides: "If any person keep a shop, or place resorted to for the purpose of gambling, or permit or suffer any person in any house, shop, or other place under his control or care to play at cards, faro, roulette, equality, or other game for money or other thing, such offender shall be fined, etc." Code, § 4026. This section is the same as section 2721 of the Code of 1851. The indictment in this case is in substance the same as the second count in the indictment in *The State of Iowa v. Cure*, 7 Iowa, 479, which was held on demurrer to be sufficient. See, also, *The State of Iowa v. Cooster*, 10 Iowa, 453, and the *Same v. Middleton*, 11 Id., 246. Following these cases we must hold the indictment in the case at bar to be sufficient. The demurrer therefore was correctly overruled. This case was submitted on written transcript. All that is contained therein is the indictment, demurrer, the ruling of the court thereon, and the judgment. As we have determined the only question appearing in the record before us it follows the judgment must be

AFFIRMED.

GILCHRIST v. ANDERSON ET AL.

1. **Mechanic's Lien: PAYMENT ON CONTRACT: SUBCONTRACTOR.** Where defendant contracted with T. to build a house and furnish the material, knowing that T. had to buy the lumber for the house of some one, and reserving the right to discharge mechanics' liens, if any should be claimed, and T. bought the lumber of plaintiffs, but defendant did not know that he had bought it on credit, until near the expiration of thirty days from the time the last of the lumber was furnished, when plaintiffs served upon him a notice of their lien, but before that time the contract price had become due and had been paid by the defendant to T., held that, under these circumstances, defendant could, in the exercise of reasonable diligence, have discovered that plaintiffs were entitled to a lien, and that the lien must, therefore, be established in an action for that purpose. *Winter v. Hudson*, 54 Iowa, 336, followed, and *Stewart v. Wright*, 52 Iowa, 335, distinguished.

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96	658
98	170
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Appeal from Polk Circuit Court.

TUESDAY, SEPTEMBER 19.

ACTION in equity to foreclose a mechanic's lien. The defendant Anderson contracted with one Troutman, a carpenter, to build a house for him in the city of Des Moines, and furnish the material. Troutman bought the lumber for the house, of the plaintiffs, who were lumber dealers in the city of Des Moines. Anderson knew that he had to buy the lumber for the house of some one, but did not know that he bought it of the plaintiffs, and did not know that he bought it on credit of any one until near the expiration of thirty days from the time the last lumber was furnished, when the plaintiffs served upon him a written notice of their claim. Before that time, however, the contract price of the house had become due from Anderson to Troutman, and Anderson had paid it. Upon this state of facts the court dismissed the plaintiffs' petition, and they appeal.

Barcroft, Gatch & McCaughan, for appellants.

William Kennedy, for appellee.

ADAMS, J.—The appellee claims that the case falls within the decision in *Stewart v. Wright*, 52 Iowa, 335, and such, we doubt not, was the view of the court. In that case the defendant, Mary L. Wright, averred for answer that before the service upon her of the statutory notice she had paid the contractor, Hood, and without "knowledge of any arrangement made by Hood for labor or materials for the building." On demurrer this answer was held sufficient. While the lien is a statutory one, and dates when perfected, from the performing of the labor, or furnishing of the materials, yet it is to be enforced in equity, and it was thought that it ought not to be enforced where it would be inequitable to do so.

The case at bar differs from that, in this, that Anderson knew that Troutman had to buy the lumber for the house.

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It differs also in the fact that it was provided in the contract that Anderson reserved the right to discharge mechanics' liens if any should be claimed.

The case, we think, falls more nearly under *Winter & Co. v. Hudson*, 54 Iowa, 336. It is true, that in that case, the owner knew that the materials for which claim was made, had been furnished by the parties claiming the liens. In the case at bar, Anderson simply knew that lumber had been furnished by some one. In neither case was it known to the owner that the materials had been bought on credit. Hudson's liability was not based upon the fact that she had actual knowledge that liens could be claimed, but that her knowledge was such that she was put upon inquiry. The case at bar is not quite as strong a case for the subcontractors, but we cannot distinguish it from *Winter & Co. v. Hudson*, unless we can say that the owner is put upon inquiry where he knows the names of the persons who have furnished materials, and is not put upon inquiry where he knows simply that materials have been furnished by some one.

The test question is as to whether Anderson could probably, in the exercise of reasonable diligence, have discovered that the plaintiffs were entitled to a lien. We have to say that it appears to us that he could. Troutman, with whom Anderson was dealing, knew of whom he purchased lumber. Anderson's true source of information was abundantly apparent. If he had made proper inquiry of Troutman, and Troutman had refused to answer, or had made false answers, the case might be different. His means of information would not appear to be so good.

In our opinion, then, the case cannot properly be distinguished from *Winter & Co. v. Hudson*, and the judgment must be

REVERSED.

DAY, J.—I concur in the foregoing opinion solely upon the ground that Anderson should have inquired of Troutman if there were any liens upon the property before making pay-

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ment in full. If he had made such inquiry and failed to learn of the existence of liens, I think the liens could not have been enforced against him.

STRINGER ET AL. V. K., MT. P. & N. R. CO. ET AL.

1. **Railroads: Right of Way Deed: Conditions Subsequent.** A conveyance of right of way to a railroad company will not be set aside in equity, merely because the grantee has failed to perform conditions subsequent contained in the deed.
2. **Contract: Rescission of: Equity.** Equity will not decree the rescission of a contract at the suit of one party thereto on the ground that the other has failed to fulfill his part of the engagement, if the defaulting party cannot be pleaded *in statu quo*, and injury would result to him from the rescission. In such cases, parties must resort to the courts of law, and seek the damages to which they are entitled by reason of the breach of the contract.

Appeal from Henry Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION in chancery to rescind and set aside a conveyance to defendant, granting the right of way for its railroad upon land of plaintiffs. Upon a demurrer, plaintiffs' petition was dismissed; they now appeal.

Clay B. Whitford, for appellants.

Woolson & Babb, for appellees.

BECK, J.—I. The petition shows that plaintiffs executed to the Keokuk, Mt. Pleasant and Northern Railroad Company, a conveyance for the right of way in the following words:

“In consideration of the building of said road I hereby grant to the Keokuk, Mt. Pleasant and Northern Railroad Company the right of way one hundred feet wide through the northwest quarter of the southeast quarter of section 23,

Stringer v. K., Mt. P. & N. R. Co.

township 71, range 7, in Henry county, Iowa, on the line as now surveyed, on the condition that said road is built from Keokuk to Mt. Pleasant within two years from date, and if said road is not built within two years, or if the land ever ceases to be used for railroad purposes then in either of such events it to come back to me.

"It is further provided that the railroad shall build and keep up, so long as the same is used for railroad purposes, a good hog tight fence on both sides of said right of way, the fence on the northwest side of said right of way to be built before grading is done, so as to protect my crop, and the fence on the other side by April 1, 1881, the railroad company to put in a crossing at such place as Stringer may desire, if he wants one."

Plaintiffs further allege that defendant entered upon the premises described in this instrument, and constructed the grade and completed its railroad, and has failed to erect the fences which, by the terms of the deed, it became bound to build. They pray that the deed be rescinded to the end that they "can have the right of way assessed and obtain compensation therefor, as provided by law."

A demurrer to the petition on the ground that, upon the facts herein alleged, plaintiffs are entitled to no relief in chancery, was sustained. Plaintiffs electing to stand on their petition, it was dismissed.

II. The decision of the Circuit Court was, we think, correct. By the terms of the deed the defendant's covenants to build the fences are not conditions precedent. The consideration of the deed expressed therein, is the building of the railroad. The conveyance is absolute and the covenants of defendant are independent agreements.

One of the fences provided for in the instrument, defendant became bound to build "before grading is done." The defendant was not required to build this fence before entering upon the land, or before the work of grading was commenced; it was bound to build the fence before the grading

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was completed. It clearly appears that defendant's covenant was not to be performed before the title to the lands vested in defendant, and before it was appropriated and used for the purpose specified in the deed. Under the most familiar rules of the law, this obligation of defendant cannot be regarded as a condition precedent.

III. Equity will not decree the rescission of a contract at the suit of one party thereto, on the ground that the other has failed to fulfill his part of the engagement, if the defaulting party cannot be placed in *statu quo* and injury would result to him from the rescission. In such cases parties must resort to the courts of law and seek the damages to which they are entitled by reason of the breach of the contract.

The rules we have announced are not disputed in this case; authorities need not be cited in their support. We think they are applicable to the facts presented by the record before us, and, therefore, conclude that the decree of the Circuit Court ought to be

AFFIRMED.

STATE v. CLAPPER.

1. **Practice in the Supreme Court: ABSTRACT NOT OBJECTED TO DEEMED CORRECT.** When a party has served an amended abstract on an opposite party, who has made no response thereto, such abstract must be deemed correct.
2. **— : INDICTMENT: PRESUMPTION IN FAVOR OF LOWER COURT.** When for some reason not disclosed by the record, an indictment was set aside and the cause referred back to the same grand jury, the action of the court must be presumed to be correct.
3. **Indictment: ON MINUTES OF TESTIMONY.** In such case it is no objection to a second indictment found by the same grand jury that the indictment was found on the minutes of the evidence attached to the first indictment. There was no necessity for the grand jury to see and hear the witnesses again.
4. **— : BAILEE AS OWNER.** In an indictment for taking goods from the custody of a sheriff, the sheriff was alleged to be the owner of the goods, held not bad on demurrer, as the sheriff was a bailee in possession.

State v. Clapper.

Appeal from Polk District Court.

WEDNESDAY, SEPTEMBER 20.

INDICTMENT for taking from the custody of an officer certain goods and chattels. The defendant was found guilty and judgment rendered thereon and he appeals.

No appearance for appellant.

Smith McPherson, Attorney-general, for the State.

SEEVEES, CH. J.—The attorney-general has filed an amended abstract which, as we are advised, has been served on the defendant, who has made no response thereto. Under such circumstances such abstract must be deemed true. This being so, there are but two questions that can be considered by us.

The first is whether the court erred in overruling the motion to set aside the indictment. It appears a previous indictment had been found for the same offense which, for some reason not disclosed by the record, was set aside and the cause referred back to the grand jury. In the absence of any showing to the contrary, the foregoing action of the court must in all respects be presumed to be correct.

As we understand, the present indictment was found on the minutes of the evidence attached to the first indictment and one additional witness who was examined before the grand jury. The motion to set aside the indictment, among other reasons, was based on the fact that all the witnesses upon whose evidence the indictment was found were not examined by the grand jury. But this is a mistake. Both indictments were found by the same grand jury, and therefore the witnesses were examined by such jury. When the first indictment was found the grand jurors heard the evidence, and saw the witnesses, and there was no necessity to hear or see them again. Several other reasons are assigned in the motion as grounds for setting aside the indictment, but in the state of the record the foregoing is the only one that can be considered.

Hoefer v. City of Burlington.

The second question we are called upon to consider is as to the sufficiency of the indictment. It was found under section 3915 of the Code, and substantially charges a crime as defined by the statute. We are unable to discover any objection thereto. The most specious grounds assigned in the demurrer is that the sheriff, from whom the property was taken was alleged to be the owner thereof. This, we think, is correct because the sheriff was a bailee in possession.

AFFIRMED.

HOEFER v. CITY OF BURLINGTON.

1. **Practice in Supreme Court: ASSIGNMENT OF ERRORS.** An assignment of error in these words: "The court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against the defendant," held not sufficiently specific under Code, § 3207.

Appeal from Des Moines District Court

WEDNESDAY, SEPTEMBER 20.

THE plaintiff was marshal in and for the defendant during the year 1876, and brought this action to recover one dollar per day for attendance in the police court in addition to a stated salary. The defendant pleaded a counter-claim and denied plaintiff's right to recover. By consent there was a reference to Hon. F. W. Newman, who made a finding of facts, and recommended that judgment be rendered for the plaintiff. Exceptions were filed to the report of the referee, which were overruled and judgment rendered for the plaintiff. The defendant appeals.

C. L. Poor, for appellant.

J. C. Power and S. K. Tracey, for appellee.

Hoefer v. City of Burlington.

SEEVERS, CH. J.—To the report of the referee the following objections were filed: 1. The referee erred in holding that “as a matter of law the marshal was elected in March, 1876, for two years, with a stated salary, fixed by ordinance, exclusive of the service rendered at the police court at one dollar per day.” 2. The referee erred in his conclusion of law upon “the agreement of facts,” and facts found that the plaintiff was entitled to recover. 3. The referee erred in disallowing the defendant’s counter-claim. The only error assigned is in these words: “The court erred in overruling the defendant’s exceptions to the report of the referee and entering judgment against defendant.” It is objected by counsel for the appellee that this assignment of error is not sufficiently specific under Code, § 3207. We feel constrained to say this objection is well taken. In *Oschner v. Schunk et al.*, 46 Iowa, 293, the assignment of error was as follows: “The court erred in overruling the motion for a new trial.” This, it was held, was not sufficiently specific. The case at bar clearly, we think, falls within the rule enunciated in the cited case. See, also, *Reilly v. Ringland*, 44 Iowa, 422; *Morris v. C., B. & Q. R. R. Co.*, 45 Id., 29; *Tomblin v. Ball*, 46 Id., 190; *Benton v. Nichols*, 47 Id., 698.

AFFIRMED.

Langford & Orton v. Ottumwa Water Power Co., Garnishee.

LANGFORD & ORTON v. OTTUMWA WATER POWER CO. ET AL.,
GARNISHEE.

1. **Contract: subscription to stock.** Garnishee in writing, signed in his own name, agreed to take certain shares of the capital stock of a corporation "to be paid by Peck." *Held* that the garnishee was personally liable therefor to the corporation and to the creditors of the corporation on process of garnishment.
2. ——: **FOR ACT OF ANOTHER.** When one in writing contracts in his own name for the act of another, he becomes thereby personally bound, unless it appears from the contract itself that he did not intend to bind himself personally.
3. **Practice in Supreme Court: evidence and instructions: error without prejudice.** Objections to the admission of evidence and to the giving of instructions will not be considered, when the result could not have been changed by the exclusion of the evidence and the withholding of the instructions complained of.

Appeal from Wapello Circuit Court.

WEDNESDAY, SEPTEMBER 20.

G. W. DEVIN was garnished as the debtor of the Ottumwa Water Power Company, upon an execution, issued on a judgment in favor of the plaintiffs, and against defendant, the company. The garnishee answering, denied indebtedness to the defendant in execution, and an issue was formed upon his answer which was tried to a jury and judgment rendered for plaintiffs against the garnishee, who now appeals.

Morris J. Williams, H. M. Kellogg and D. J. Devin, for appellant.

Stiles & Lathrop and Stiles & Beaman, for appellees.

BECK, J.—I. The plaintiffs claim that the garnishee and appellant, Devin, is indebted to the defendant in execution, the Ottumwa Water Power Company, upon a subscription to the stock of that corporation, which, as shown by the abstract, is in the following form and language:

Langford & Orton v. Ottumwa Water Power Co., Garnishee.

"We, the undersigned, subscribers to the capital stock of "The Ottumwa Water Power Company," do hereby consent and agree to and with said corporation and with each other to take the number of shares of the capital stock of said corporation set opposite our respective names, and to subject ourselves in relation thereto to the articles of incorporation of said corporation now recorded in the recorder's office of Wapello county, Iowa, as well as to the by-laws and amendments made in pursuance thereof, and in conformity to law:

NAMES.	SHARES.
Chas. F. Blake	Ten.
J. O. Briscoe.....	Five.
Wm. Daggett.....	Ten.
Daniel Eaton.....	Five.
W. B. Bonnifield.....	Ten.
J. M. Hedrick.....	Ten.
Wm. McNett.....	One.
S. A. Swiggett.....	Three.
H. D. Palmer.....	Two.

(and others—Then)

{ G. W. Devin.....	Five—to be paid by Peck—
{ G. W. Devin.....	Five, to be paid by Blake
W. H. Cooper & Co.....	Two.
C. B. Castle	

The garnishee insists that he is not liable upon the subscription, and that it was made by him under an agreement with Peck that he should pay it, who alone, and not plaintiff, is liable thereon.

The subscription of Devin last appearing upon the instrument above set out, is not in question in this action. In accord with the practice in such cases prevailing in this state, there are no formal pleadings setting out the cause of action and defense thereto.

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The signature of Devin is not disputed and no question is raised involving the right of the company to recover upon the subscription. The contention involves the question whether Devin or Peck is liable thereon.

II. The subscription is a contract to take and pay for the number of shares of stock specified by the subscription. The ^{1. CONTRACT:} subscriber is a party on one side, and the corporation on the other. It is not a contract between Peck and Devin to the effect that Peck undertakes to pay for the stock subscribed for by Devin. Peck does not sign the subscription. The words "to be paid by Peck" surely cannot bind that person, for he is no party to the subscription; neither does it purport to bind him. The most that can be claimed for the words is that they constitute a direction to Peck to pay pursuant to some arrangement not disclosed by the instrument.

It cannot be claimed that upon the face of the instrument Devin is to be regarded as the agent of Peck. There is nothing to support such a position.

But if the subscription is regarded as a covenant by Devin that Peck will pay, Devin is *personally* liable as the promisor ^{2. — : for} under the familiar rule that when one contracts in his own name for the act of another he becomes thereby personally bound, unless it appears from the contract itself that he did not intend to bind himself personally.

We reach the conclusion that, upon the face of the subscription, Devin is bound to the corporation to pay for the stock mentioned in the subscription. He is, therefore, liable in the garnishee proceeding as the debtor of the company.

III. The plaintiff was permitted against the garnishee's objection to introduce evidence tending to show that at a ^{3. EVIDENCE and instruction : error without pre-judice.} public meeting, held to forward the organization of the Water Power Company, Devin proposed to subscribe for five shares, if any one would cash certain notes held by him. This proposition was ac-

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cepted by Peck, and thereafter Devin made the subscription for the stock as shown in the paper above copied from the record, and that afterwards he declined to transfer the notes in accord with the terms of his proposition. The admission of this evidence and certain instructions given to the jury by the court, to the effect that Devin is bound by the terms of his proposition, and his liability upon the subscription is determined thereby, constitute the grounds of several assignments of error.

Under a familiar rule of the law, the written contract embodied in the subscription cannot be varied by parol evidence of prior transactions or agreements of the parties. The writing speaks for itself, and it is presumed that all prior oral agreements of the parties upon the same subject were merged into, or superseded and set aside by the written contract. This rule, it is insisted, was disregarded by the admission of the evidence and the instructions just recited. If this position be correct, the errors complained of are without prejudice to the garnishee, for, as we have seen, plaintiff is entitled to recover upon the face of the subscription. If, therefore, the rulings complained of had been the other way, and the evidence had been excluded and the instructions complained of had not been given, the verdict would have been the same under rulings of the court in accord with the law as above expressed.

The instructions asked by the garnishee and refused by the court are in conflict with our view of the law of the case, as above stated, and were therefore properly refused.

IV. The plaintiffs move to strike the instructions and the evidence from the record, for the reason that the instructions are not properly preserved by bill of exception and the abstract does not show that it contains all the testimony. The motion is overruled. We think, upon these points, the abstract presents the case in accord with the rules recognized by our prior decisions.

The judgment of the Circuit Court is

AFFIRMED.

Houghtaling v. Hills.**HOUGHTALING & CO. V. HILLS ET AL.**

69	287
79	172
59	287
89	73

1. **Sale: RESCISSION FOR FRAUD: RECOVERY OF GOODS.** In an action to avoid a contract for the sale of goods and to recover the possession of the goods, it is not enough to allege that the defendant, when he purchased the goods, knew that he was hopelessly insolvent and unable to pay for the goods for which he was already indebted, and that plaintiff was wholly ignorant of his insolvency. It is necessary in such a case to allege that the purchase was made with the intent to take advantage of the insolvency and not to pay for the goods:—following *Osiego Starch Factory v. Lendrum*, 57 Iowa, 573.
2. **Pleading: PETITION IN REPLEVIN: ALL CONSTRUED TOGETHER.** All the allegations of a petition must be considered together, and if, when so considered, it appears that a good cause of action is not presented, a demurrer will lie.

Appeal from Wapello District Court.

WEDNESDAY, SEPTEMBER 20.

THIS is an action of replevin by which the plaintiffs seek to recover of the defendants certain packages of tea. There was a demurrer to the petition, which was sustained, and plaintiffs appeal. The facts appear in the opinion.

Moore & Hammond, for appellants.

Wm. McNett, for appellees.

ROTHROCK, J.—It is stated in the petition in substance that plaintiffs are importers and jobbers in teas, and that their place of business is in the city of New York, and that they are the absolute owners of certain described teas of which the defendants have possession, and which they wrongfully detain, and that said teas were neither taken on the order or judgment of a court against the plaintiffs or either of them. The petition then proceeds to state the facts as to the defendants' possession as follows:

“That the alleged cause of detention, according to the best

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belief of plaintiffs, is a certain pretended fraudulent purchase of said teas by said Hills from the plaintiffs, which the plaintiffs aver and charge by reason whereof no property in said teas passed from said plaintiffs to said Hills; that said pretended purchase by said Hills was, and is, fraudulent in this, that at the time said Hills pretended he purchased said teas of plaintiff, he was hopelessly insolvent and unable to pay for the goods he already owed for, which he well knew; that he also well knew that plaintiffs and their agent, through whom they sold the goods to him, were in total ignorance of his insolvent condition financially; that said Hills also knew that if plaintiffs or their agent had known of his said insolvent condition they would not have sold or offered to sell said teas to him; that said defendants, J. H. Merrill & Co., also knew of said Hills' insolvent condition, and they also had full notice and knowledge of the fraud said Hills had practiced on said plaintiffs, but notwithstanding said notice and knowledge, and for the purpose of aiding and abetting him therein, and for the purpose and with the intent of profiting by said fraud, it was agreed by and between them and said Hills, that he should give them a mortgage on all his property, not exempt from execution; that on or about the 23d day of March, 1881, said teas came into the possession of said Hills, and while the packages were unbroken (said Hills having no use or need for said goods), said agreement was perfected, to-wit: on the 29th of March, 1881, six days after said Hills got possession thereof, by said Hills executing a mortgage to said Merrill & Co. as aforesaid, and now said Merrill & Co. and said Hills claim the possession of said teas from the plaintiffs under said fraudulent mortgage; that plaintiffs have sustained damages thereby in the sum of ten dollars."

The demurrer to the petition is in these words:

"1. The petition admits the sale and delivery of the goods to Hills, and fails to allege any facts which in law constitute the said sale fraudulent or voidable.

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"2. The failure of Hills to disclose his insolvency is not in law sufficient to defeat his title, nor was it fraudulent, nor is the fact that plaintiffs would not have sold him the teas, if they had been so informed, sufficient to defeat Hills' title.

"3. The knowledge of J. H. Merrill & Co., of Hills' insolvency when they took the mortgage, nor their knowledge that Hills had not informed plaintiffs thereof, would not avoid the mortgage nor constitute fraud. They therefore ask judgment on this their demurrer."

It appears from the averments of the petition that the plaintiffs "sold the goods" to Hills through an agent of plaintiffs and that full delivery of the possession of the property was made to him. It is claimed, however, that Hills made the purchase fraudulently, because he was hopelessly insolvent and unable to pay for the goods for which he was already indebted, which he well knew, and that he knew that the plaintiffs and their agents were in total ignorance of his insolvent condition, and knew that if the plaintiffs or their agent knew of his insolvency they would not have sold, or offered to sell, said teas to him. It will be observed that the petition does not charge that Hills purchased the goods with the specific intent not to pay for them. It is making a purchase with intent to take advantage of the insolvency and not pay for the goods purchased that avoids the sale, and enables the seller to replevin the goods. Cooley on Torts, 478. In the case of the *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, we held that when goods were purchased by an insolvent with intent not to pay for them, the seller might rescind the contract of sale and recover the goods. That case was ably and exhaustively argued, and received our most careful consideration, and it will be seen from the opinion that it was not claimed that anything short of a specific intention on the part of the purchaser not to pay for the goods would authorize a rescission of the contract of sale, and a recovery of the goods.

It is claimed by counsel for appellants that the demurrer

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should have been overruled because the petition was sufficient
 2. **PLEADING:** without the allegations attacked by the demurrer.
^{all construed} together. It is true the petition follows the statute and al-
 leges that the plaintiffs are the absolute owners of the prop-
 erty and entitled to the possession thereof, and the defendants
 wrongfully detain the same. But the statute also requires
 that the plaintiff shall state the facts constituting the alleged
 cause of detention. In doing this plaintiffs disclose that
 there was a sale and delivery of the goods, and claim that the
 sale was fraudulent and should be held to be no sale. They
 say in argument "that no contract ever existed, that no prop-
 erty ever passed between the parties." But the petition does
 aver that a contract of sale was made and the goods delivered,
 and it is sought to avoid the contract on the ground of fraud.
 In pleading these grounds of fraud the petition shows that
 the acts of Hills were not such as to authorize the rescission
 of the contract. Taking all the allegations of the petition to-
 gether we have no doubt as to the correctness of the ruling
 of the court in sustaining the demurrer.

AFFIRMED.

59	290
79	616
59	290
83	116
59	290
95	489
59	290
96	288
96	306
59	290
118	97
59	290
121	566
59	290
135	375

STATE v. SHAFFER.

1. **Criminal law: INDICTMENT FOR BURGLARY: DUPPLICITY.** An indictment for burglary with intent to steal is not bad for duplicity because it contains allegations of facts constituting larceny. The charge of stealing may be regarded as a mere pleading of evidence or surplusage which might properly have been introduced to support the charge of an intent to steal. Following *State v. Hayden*, 45 Iowa, 11; and distinguishing *State v. Ridley*, 48 Iowa, 370.
2. **—: BURGLARY: EVIDENCE: POSSESSION OF GOODS.** The presumption of guilt which arises, in a case of larceny, from the possession of goods recently stolen, does not apply with equal force to the crime of burglary with intent to steal. Such possession is evidence tending to show that the defendant committed the burglary, but is not of itself sufficient, even if unexplained, to warrant a conviction.

State v. Shaffer.

Appeal from Henry District Court.

WEDNESDAY, SEPTEMBER 20.

THE indictment in this case charges that the defendant broke and entered the barn of J. M. Holland in which barn goods and merchandise and other things of value were kept for use, sale and deposit, with felonious intent to take, steal, and carry away the goods, merchandise, and other valuable things; and twenty bushels of wheat of the value of \$14, six sacks of the value of \$2, and one bridle of the value of \$1.50 of the goods of J. M. Holland did feloniously take, steal, and carry away, etc. There was a verdict of guilty and judgment thereon, from which the defendant appeals.

L. G. & L. A. Palmer, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. The defendant after verdict moved in arrest of judgment on the ground that the indictment is insufficient and void. The motion was overruled 1. INDICT-
MENT for
burglary: du- and the defendant assigns the action of the court plicity. in overruling the same as error. He insists that the indictment is bad for duplicity in that it charges a felonious breaking with intent to commit larceny, and also the commission of larceny. In *State v. Hayden*, 45 Iowa, 11, an indictment which was in substance the same as that in this case was sustained. It was held that the charge of stealing might be regarded as a mere pleading of evidence or surplusage which might have been properly introduced in support of the charge of an intent to steal. That case was tried upon that theory in the District Court, and the jury were instructed that the defendant was on trial for breaking and entering the building with intent to steal, and he was found guilty of that offense. The same may be said of the case at bar. The court instructed the jury that "the charge in the indictment that the defendant stole goods is for the purpose

State v. Shaffer.

of charging the public offense he intended to commit and the larceny, if any, may be shown and considered for the purpose of showing the intent of the defendant in breaking and entering said building." This case is, then, in strict accord with the rule laid down in Hayden's case. Afterwards in *The State v. Ridley and Johnson*, 48 Iowa, 370, in an indictment substantially the same as in Hayden's case, and the case at bar, the court instructed the jury that three crimes were charged in the indictment:

"1st. Larceny in a store in the night time; 2d, breaking and entering a store with intent to steal; and 3d, simple larceny."

The defendant was found guilty of larceny from a store in the night time. It was urged in that case that the conviction was proper under the indictment, because the claim charged was a compound offense, and that under section 4300 of the Code the several offenses included in the compound offense could properly be charged in the same indictment. We there held that burglary and larceny were not a compound offense and that as the defendant was convicted of the larceny on an indictment for feloniously breaking and entering a building, the conviction could not stand. The question in the last named case, so far as it involved the sufficiency of the indictment, was confined to the inquiry whether or not the crime charged was a compound offense. It having been held that it was not a compound offense, under the rule in Hayden's case, the defendants were convicted of a crime with which they were not charged. We think the indictment in this case was sufficient to support a verdict of guilty of the felonious breaking of the building.

II. Upon the question of the possession of the goods recently stolen the court instructed the jury as follows: "And

2. **BURGLARY:** if the barn was closed up at night so that it evidence: pos- could not be entered without breaking, and it session of goods.

was so closed at nine o'clock at night, and at about twelve o'clock of the same night some of the goods

State v. Shaffer.

kept in said barn during this time were found in the possession of the defendant, or the defendant and others, this would be *prima facie* evidence that the defendant broke and entered said building; and this alone, in the absence of other evidence, and the possession, not explained showing it to be an innocent possession, would be sufficient to warrant a conviction of the crime charged."

The substance of this instruction is that the possession of goods recently burglariously stolen is of itself, if unexplained, sufficient evidence upon which to find the defendant guilty of the burglary. We think the presumption which arises from the possession of goods recently stolen is applicable to the crime of larceny, but not the crime of burglary. The most that can be said of it is that it is evidence tending to show that the defendant committed the burglary. It surely was competent evidence bearing upon the guilt of the defendant, but that it was of itself sufficient, if unexplained, to warrant a conviction appears to be without the support of authority, but directly contrary thereto. *Jones v. State*, 6 Parker, 125; *Whart. Crim. Ev.*, Sec., 763; *Ingall v. State*, 48 Wis., 647; *Stewart v. The People*, Sup. Ct. Michigan, 3 N. W. Rep., (363); 2d Bishop's Crim. Procedure, Sec. 747, note 3.

For the error in this instruction the judgment of the District Court must be

REVERSED.

Milliken v. Daugherty.

MILLIKEN v. DAUGHERTY.

1. Appeal: LESS THAN \$100: CERTIFICATE OF JUDGE. The appellant's abstract recited as follows: "The court gave the certificate of the question involved, upon which it was desirable to have the opinion of the Supreme Court, and stated the particular question of law to be: Where suit is brought upon a note barred on its face by the statute of limitations (limitation being pleaded by defendant), is the burden of proof on plaintiff to show the exception taking the note out of the statute?" Held not a sufficient certificate, under section 3173 of the Code, to give this court jurisdiction of a cause involving less than \$100. *Yant v. Harry*, 55 Iowa, 421, distinguished.

Appeal from Lee Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION upon a promissory note for less than one hundred dollars. There was a trial to the court, and judgment for the plaintiff. Defendant appeals.

Hagerman, McCrary & Hagerman, for appellant.

Marshall & Son, for appellee.

ROTHROCK, J.—There is contention between the parties as to whether the certificate of the trial judge is sufficient to give this court jurisdiction of the appeal. It is recited in the abstract that the "court gave the certificate of the question involved upon which it was desirable to have the opinion of the Supreme Court, and stated the particular question of law to be: Where suit is brought upon a note barred on its face by the statute of limitations (limitation being pleaded by defendant), is the burden of proof on plaintiff to show the exception taking the note out of the statute?"

Appellee by motion contends that the trial judge refused to certify that the case involved a question of law upon which it was desirable to have the opinion of this court, and he exhibits with the motion what is claimed to be the certificate,

Milliken v. Daugherty.

and which seems to support the claim made by him. Appellant insists that his abstract cannot be impeached by motion. Whether it can be or not is immaterial, because the abstract is defective in not setting out the fact that the judge's certificate stated that it was desirable to have the opinion of this court upon the question certified. Section 3173 of the Code requires that the judge shall so certify, and that without such certificate no appeal shall be taken. The record as made by appellant's abstract should show that this court has jurisdiction.

It is urged by appellant that the certificate is sufficient, and he cites *Yant v. Harvey*, 55 Iowa, 421. That was an equitable action, and it is there held that it is not necessary to set out the certificate of the judge to the evidence in the abstract, but that a recital that such certificate was made and the date thereof is sufficient. In cases involving less than \$100 it is different. It is necessary that the question certified shall be set out in the abstract, that it may be determined by this court, and it must appear by the abstract that the trial judge certified that it was desirable to have the question involved determined by this court. The appellant's abstract does not show that such a certificate was made and the case must be

DISMISSED.

Pettus v. Farrell.

50	298
86	708
59	296
114	456

PETTUS V. FARRELL, ADM'X.

1. **Administrator: BARRED CLAIM: EQUITABLE RELIEF.** Plaintiff's attorney held a claim of the fourth class against the estate, and, at the request of another attorney, whom he had good reason to believe was authorized to speak for the administratrix, delayed proving the same within the year provided by section 2421 of the Code; but as the delay was slight, and the estate was solvent and unsettled, and there was no counter-equity arising, *held* that these facts entitled plaintiff to equitable relief as against the bar of the statute.
2. **Verdict: SPECIAL: JUDGMENT ON.** In this case the court held that the claim was barred and hence directed the jury to find a general verdict for the defendant, but the jury was also required to answer certain special interrogatories, and the answers given, so far as they went, were favorable to plaintiff, but to one question vital to the defense the jury answered "we do not know." *Held* that although the court erred in holding the claim barred, yet plaintiff was not entitled to judgment in this court on the special verdict, but only to a new trial in the court below.

Appeal from Lee Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION upon an account. There was a trial to a jury, and verdict and judgment were rendered for the defendant. The plaintiff appeals.

Hagerman, McCray & Hagerman, for appellant.

D. N. Sprague, for appellee.

ADAMS, J.—The account was contracted by the defendant's intestate, and was for liquor sold him. The defendant for answer averred among other things that the claim
1. ADMINISTRATOR: was barred by the statute of limitations, because
barred claim: was barred by the statute of limitations, because
equitable relief. the same was not filed and proved within one
year from the giving of notice of administration.

The fact appears to be that the notice was given on the 26th day of May, 1879; that the claim was filed on the first

Pettus v. Farrell.

day of March, 1880, but not in time to be proved earlier than the June term of that year, as that was the first term for which notice could be given after the filing of the claim. Under section 2421 of the Code, and the repeated rulings of this court, it is manifest that the claim was barred, unless peculiar circumstances are shown which entitle the plaintiff to equitable relief. The plaintiff pleaded and proved certain circumstances upon which he relies as sufficient to entitle him to such relief. The court held that they were insufficient and instructed the jury to find for the defendant. The ruling of the court in this respect is assigned as error.

The evidence shows, and the court found, that the plaintiff's attorneys received the claim for collection in December, 1879; that upon receipt of the claim they prepared a notice for the administratrix to appear at the March term, 1880, which would have been in due time; that they were induced, however, to delay filing the claim and serving the notice by a request of one Gibbons, a member of the Lee county bar, who requested that no costs should be made, and promised to see the administratrix with a view to an adjustment of the matter; that Gibbons had never been specially employed in respect to this claim, but had been employed to some extent by the administratrix in behalf of the estate. It further appears that the estate is solvent and unsettled.

The foregoing are in substance the facts upon which the plaintiff relies for equitable relief, and the question presented is as to whether they are sufficient.

It should be observed that the delay in this case was very slight. The claim was filed and notice served nearly three months before the expiration of the year. And while it is true that this was not done in time to prove the claim within the year, yet the term at which it was provable commenced within a few days after the expiration of the year. Again, the estate is solvent and unsettled. Such a fact is mentioned in *Brayley v. Ross*, 33 Iowa, 507, as a circumstance which should be allowed its influence. Where such is the case it is

Pettus v. Farrell.

manifest that a court is justified in granting relief upon slighter circumstances than it would be in a different case. No counter-equity arises. The defendant's sole reliance is the technical bar.

We proceed then to inquire into the grounds upon which the plaintiff seeks relief. His attorneys made a mistake. They delayed under the supposition that they were accommodating the estate in compliance with the request of the administratrix's attorney. Perhaps no great diligence was necessary to save them from such mistake; but we assume that Gibbons was a reputable attorney and entitled to ordinary professional confidence. Now, when he made a request in behalf of the estate he impliedly assumed to represent it, and this assumption, together with the knowledge possessed by the plaintiff's attorneys that Gibbons had been employed in behalf of the estate to some extent, we think, was a sufficient excuse for their slight delay.

Having reached the conclusion that the claim is not barred, we have to inquire whether the plaintiff is entitled to judgment. He insists that he is. He predicates his judgment on the special verdict of the jury. Notwithstanding the jury was instructed to find a general verdict for the defendant, they were directed to answer certain interrogatories and the answers given were favorable to the plaintiff so far as they went, and it is claimed that they would have led to a general verdict for the plaintiff but for the instructions given on account of the supposed bar of the statute. The defendant denies that the answers as they stand would have led to such verdict, because they are not complete, and one of the issues tried was not passed upon by the jury.

The defendant averred that the liquor for which the account accrued was sold with intent to violate the laws of Iowa. By one of the interrogations propounded the jury was required to find whether the liquor was sold with such intent, and the answer given by the jury was: "We do not know the intent."

Pettus v. Farrell.

The plaintiff does not claim that this was equivalent to finding that there was no such intent as alleged, but was equivalent to leaving the question unanswered, and being unanswered the defense based upon the alleged intent was not made out.

If the general verdict had been for the plaintiff, there would certainly not be enough in the special verdict to entitle the defendant to have the general verdict set aside. The burden was upon her to establish the alleged defense. Her only means, in such case, of making out her defense, would have been to ask the court to require the jury to answer the interrogatory respecting the alleged intent. It is possible, that while they preferred to evade it, they might, if required to answer it, have felt constrained to answer it in the affirmative. And, notwithstanding the general verdict was in her favor, she might, perhaps, in anticipation that the instruction directing the general verdict would be held erroneous, have required that the issue respecting the alleged intent be specially passed upon, so that if the finding thereon should be in her favor she would, notwithstanding the error in the instruction, if any, directing the general verdict in her favor, be still entitled to a general verdict. The question is, was she bound, in anticipation that the instruction might be held erroneous, to undertake to save her rights by securing a special verdict in her favor respecting the alleged intent, and having failed to do so, is she now bound by the incomplete special verdict which leaves a material issue tendered by her wholly undetermined?

It appears to us that her case is not different from what it would have been if there had been no special verdict of any kind. The plaintiff, then, does not appear to be entitled to judgment upon the special verdict, and the case must be remanded for another trial.

REVERSED.

McKeever v. Jenks.

McKEEVER ET AL. V. JENKS ET AL.

1. **Fence Viewers: JURISDICTION: STATUTE CONSTRUED.** Section 1490-1492 of the Code, and section 2, chapter 106, acts of 1876, clothe the fence viewers with jurisdiction to decide upon the sufficiency of a hedge and its value, and their decision upon questions within their jurisdiction is conclusive.
2. **Practice: ERROR WITHOUT PREJUDICE.** When the very issues excluded by sustaining a demurrer, though erroneously, to one count of an answer, were pleaded in another count, and presented to the jury by proper instructions and a special verdict was rendered thereon, *held* error without prejudice to the defendant, and no ground for reversal.
3. **Fences: RECOVERY FOR HEDGE: STATUTE CONSTRUED.** The language of section 2, chapter 106, acts of 1876, is not to be so construed as to defeat recovery for the value of one-half of a hedge merely because at some points on the line, on account of the nature of the ground, a hedge could not be grown for short distances.
4. **Evidence: VARIANCE.** When plaintiff claimed to recover the value of half the hedge, alleging the value of the whole to be \$237.50, and the evidence was that the fence viewers found the value of the half which defendant was required to pay for and maintain to be \$118.50, *held* no variance between pleading and proof.
5. **Practice in Supreme Court: OBJECTIONS NOT ARGUED.** Where counsel fail to present in argument objections to the rulings of the trial court in refusing instructions, this court will not consider such objections.
6. **—: DEFENSE NOT MADE BELOW WAIVED.** Matter of defense which was not presented to the trial court must be deemed to have been waived, and cannot first be urged in this court.
7. **Constitutional Law: STATUTE AS TO FENCE VIEWERS.** The statutes under which the fence viewers acted in this case are not unconstitutional as depriving persons of their property without due process of law, but were enacted by the legislature in the exercise of its proper authority to provide special tribunals to determine the rights of parties under appropriate rules applicable thereto.

Appeal from Clarke Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION to recover one-half of the value of a hedge grown by plaintiffs upon the line of their land, which constitutes a division fence between plaintiffs' and defendants' lands. There was a verdict for plaintiffs and a judgment rendered

McKeever v. Jenks.

thereon, from which defendants appeal. The facts of the case appear in the opinion.

Stuart Bros. and McIntire Bros., for appellants.

Temple & Talman and John Chaney, for appellees.

BECK, J.—I. The petition alleges that plaintiffs “built a good and substantial hedge fence,” on the line of their land, constituting a division fence between it and land owned by defendants, which was then uninclosed and unimproved; that subsequently defendants inclosed their land and joined their fences to plaintiffs’ hedge; that the fence viewers of the township, upon plaintiffs request, after notice to defendants, did inspect the hedge and ascertain its value and that defendants were notified of the award by plaintiffs, who demanded payment for the fence. The plaintiffs claim to recover in this action double the value of one half of the fence as fixed by the award. The defendants answered the petition denying generally all its allegations, and subsequently filed two separate amendments thereto which are in the following language.

“FIRST AMENDMENT TO ANSWER.”

“2. They say that they are, and were long before the proceedings referred to before the fence viewers, the owners of one-half of the said fence; that the said A. McKeever built such portion of said fence as has been built by him under and by virtue of a contract with the prior owner of the land that now belongs to the defendants; that he was fully paid for all the work done by him and that the title and ownership of the one-half of said fence passed to these defendants upon purchasing said land.

“3 That said fence is wholly worthless and a damage to the owner of the land on either side thereof and of no value whatever, but an injury.

“4. Defendants claim the right to introduce evidence and

McKeever v. Jenks.

be heard upon the foregoing defense. That they claim also their right to trial by jury therein. That before the said fence viewers they asked permission to plead and to introduce evidence upon the foregoing and other issues which was refused them entirely by said tribunal.

"That they also ask that the plaintiffs be put upon proof of their claim and the facts necessary to be ascertained before the said plaintiffs would have any right to recover, but that said board without evidence of any kind upon any point, and after refusing to consider or hear any and all evidence, made the findings set forth."

"SECOND AMENDMENT TO ANSWER.

"1. That the law and statute under which said fence viewers acted is unconstitutional in this: it deprives a person of, in any manner, being heard in court; it deprives a person of property without a day in court; it deprives a person of a trial by jury, which defendants demand upon the issues herein presented.

"2. Defendants further plead, by way of defense, that there never was, nor is there at this date, a hedge fence of the kind and character required by law; that there never was, nor is there at this date, a hedge fence of any kind upon the line maintained by plaintiffs, and for this cause said hedge fence viewers had no jurisdiction to act.

"3. That said fence viewers acted without authority in law.

"4. That said plaintiffs, long prior to the date said fence viewers acted, had been paid in full for said hedge fence, and had received full compensation for the same.

"5. That by reason of the fact of contract of purchase and payment, these plaintiffs are estopped from urging payment a second time, as is being done by this prosecution."

To these answers plaintiffs demurred, and the abstract shows that the demurrer was sustained as to the 3d and 4th counts of the first amendments, and to the 3d, 4th, and 5th, counts

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of the second, and was overruled as to the other counts of the answer. The decision upon the demurrer is complained of and the assignments of error assailing it will be first considered.

II. The fence viewers in this case determined the sufficiency of the hedge and its value. The statute clothes them

^{1. FENCE} _{viewers:} with jurisdiction to decide upon these matters. ^{jurisdiction:} Code, §§ 1490-2; Acts 1876, chap., 106, § 2. Their _{statutes con-} strued. decision upon questions within their jurisdiction is conclusive. *Bills v. Belknap*, 38 Iowa, 225. The 3d and 4th counts of the first amended answer, and the 3d count of the second, deny the conclusiveness of the decision of the fence viewers. The demurrer as to these counts was properly sustained.

III. The 2nd count of the first amendment, and the 4th and 5th, of the second, allege that plaintiffs had been paid for the hedge. The demurrer as to the ^{2. PRACTICE:} _{error without prejudice.} 2nd count of the first amendment was overruled and was sustained as to the 4th and 5th count of the second. There is patent inconsistency in this decision as it is stated in the abstract. The court in the 11th and 15th instructions directed the jury to determine whether the plaintiffs had been paid for growing the hedge, or had grown it under a contract with the owner of the adjoining land, and if they should so find, plaintiffs cannot recover. There was evidence upon the issue thus presented to the jury, upon which, in special findings, as well as in the general verdict, they found for plaintiff. We are inclined to the opinion that the statement in the abstract to the effect that the demurrer was sustained as to the 4th and 5th counts of the first amended answer appear through mistake. But if the ruling was made as stated in the abstract, no prejudice resulted to defendants. The very issues excluded thereby were pleaded in another count of the answer and presented to the jury by proper instructions and a special verdict returned thereon.

IV. It is insisted by defendants that the 10th instruction given by the court is erroneous, for the reason that no evi-

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dence was offered tending to show that defendants joined their fence to plaintiffs' hedge. But this objection is not based upon facts. There is such evidence in the record.

V. The 7th instruction given to the jury is, in effect, that plaintiffs are entitled to recover, although for short distances, it was impracticable, on account of the condition of the ground, to grow the hedge. This instruction defendants insist is erroneous and base their objections upon section 2, chapter 106, acts 1876, which provides that "when any person builds a hedge on the *entire line* between his own, and uninclosed land," he may recover the value of one-half the hedge when the adjoining land is inclosed.

3. FENCES : recovery for hedge : statute construed. The language of this statute is not to be so construed as to defeat recovery by plaintiffs on the ground that at some point on their line a hedge could not be grown for a short distance. The purpose of the statute is to regulate the compensation when a hedge is grown upon a part of his line, and a fence erected upon the other part by the land owner. In such a case he could not claim compensation for the fence at the same rate as the hedge. The fence and hedge in settling the rights and obligations of the parties to pay for and maintain them, are to be separately considered. Hedges cannot be grown in sloughs, and for this reason it is a common thing that, for a short distance along a line the hedge plant is not cultivated. Its place is supplied at such points by other kinds of fences. It surely is not the purpose of the statute to deprive the owner of the hedge of compensation for the reason that it cannot be grown for short distances on account of intervening sloughs.

4. EVIDENCE : variance. VI. The statute authorizes "the maker of the hedge to select his own half thereof," the other half is to be paid for by the adjoining owner when he incloses his land. Acts 1876, chapter 106, § 2; Code, § 1498. The plaintiffs in their petition claim to recover the value of one-half of the fence, alleging the whole value to be \$237.50.

McKeever v. Jenks.

The evidence shows that the plaintiffs selected the north half of the hedge, and the fence viewers found the value of the south half to be \$118.50. Upon these facts defendants insist that there is a variance between the petition and proof.

The position is not well taken. The plaintiffs are entitled to recover the value of the part of the hedge which under the statute the defendants are required to pay for and maintain. This they claimed and the proof supported their petition.

VII. Thirteen instructions were asked by defendants. The rulings of the court refusing them are assailed in a body ^{5. PRACTICALLY} in one assignment of errors which does not point ^{in supreme court: objections not argued.} out the objections relied upon. Counsel do not argue these instructions, but content themselves by referring to the exception taken in the court below for the grounds upon which they base their position that the instructions should have been given. Upon turning to these exceptions we find that they allege each instruction should have been given "because it is the law and is applicable."

Counsel fail to present in argument objection to the rulings of the court in refusing the instructions. For this reason we are not permitted to consider them.

VIII. It is insisted that plaintiffs cannot recover for the reason that the hedge was planted before chapter 106, of the ^{6. DEFENSE} laws of 1876, under which plaintiffs claim, was not made below waived. enacted. We are unable to discover that any such objection was made in the court below. We are required, in reviewing the case, to consider only such questions as were passed upon by the court below. The objection under consideration cannot be first urged in this court.

IX. The plaintiffs are husband and wife. The title of the land on the line of which the hedge stands is in the wife. The husband planted and cultivated the hedge and is in possession of the land. Defendants insist that there is a misjoinder of parties. It is sufficient to say that if there be such a defect of parties, as it does not appear upon the face of the petition, the objection should have been taken by an-

McKeever v. Jenks.

swer, and as it was not so raised it must be deemed to have been waived. Code, § 2650. *Melick v. First National Bank of Tama City*, 52 Iowa, 94.

X. Counsel for defendants insist that the statutes under which the fence viewers acted are unconstitutional, if they be so interpreted as to deny to the parties a trial in court upon the matters determined, either by an appeal or by other proceedings, wherein an issue may be raised thereon. This position is not argued at length, though asserted with apparent confidence.

7. CONSTITUTIONAL law:
statute as to
fence view-
ers.

The proceedings by the fence viewers are provided for by the statute in the exercise of the authority of the legislature to provide special tribunals to determine the rights of parties under appropriate rules applicable thereto. The doctrine of the courts applicable to the question raised by counsel is well expressed in Cooley's Constitutional Limitations, p. 354-5, in the following language:

"But there are many cases where the title to property may pass from one person to another without the intervention of judicial proceedings, properly so called, and we have already seen that special legislative acts designed to accomplish the same end have also been held valid in some cases. The necessity for "general rules," therefore, does not preclude the legislature from establishing special rules for particular cases, provided that particular cases range themselves under some general rule of legislative power, nor does the requirement of judicial action demand, in every case, a hearing in court."

The verdict is sufficiently supported by the evidence. We have considered all objections presented in argument by defendant's counsel, and have reached the conclusion that they present no ground for disturbing the judgment of the court below. It is therefore

AFFIRMED.

Maish v. Bird.

MAISH v. BIRD.

[59 307
f108 507]

1. **Mortgage of Chattles: FORECLOSURE: RECEIVER.** The mortgagee of a stock of dry goods and notions, whose debt was not due, had taken possession of the mortgaged property under his mortgage, which provided that he "might take possession whenever he should chose to do so, and sell the goods at public auction, or so much thereof as should be sufficient to pay the amount due, or *to become due*, as the case might be, with all reasonable costs pertaining to the keeping, advertising and selling the said property," and had been garnished by creditors of the mortgagor, and had brought his action in equity to foreclose the mortgage: *held*, that under Code, § 2903, he was entitled to have a receiver appointed to take possession of the goods and to sell them in the ordinary course of business.
2. **Receiver: APPOINTMENT OF: NOTICE.** Under section 2903 of the Code, where the adverse party is not within the jurisdiction of the court, and cannot be served or cannot readily be served with notice, the court may, under some circumstances, appoint a receiver without notice, and an appointment so made in this case was approved.

Appeal from Polk Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION to foreclose a chattel mortgage upon a stock of dry goods and notions. In the petition for foreclosure the plaintiff prayed for the appointment of a receiver to take possession of the goods and to sell the same in the ordinary course of business. In an amended petition he brought in and made defendants a large number of attaching creditors who had garnished the plaintiff. The court appointed a receiver as prayed. The defendant, Bird, filed a motion to set aside the appointment of the receiver. The court overruled the motion. From the order overruling the motion the defendant, Bird, appeals.

Wm. Phillips, for appellant.

Wright, Cummings & Wright, for appellee.

Maish v. Bird.

ADAMS, J.—The statute provides that “on the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, <sup>1. MORTGAGE
of chattels:
foreclosure:</sup> any property which is the subject of the controversy and that such property or its rents or profits are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court * * if satisfied that the interest of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property.” Code, § 2903.

The defendant, Bird, insists that the plaintiff is not within the provision of this statute for various reasons. In the first place he insists that to justify the appointment of a receiver of property there must be an action in which the right to such property is drawn in controversy, and he insists that it is not sufficient that there should be an action in form where the applicant for a receiver is plaintiff, but it should appear from the petition that the plaintiff has a right of action.

This action was brought to foreclose a chattel mortgage, and the defendant Bird contends that the petition does not show a right to foreclosure, and hence does not show a right of action, and that such being the case the right to the property is in no proper sense drawn in controversy. His position in this respect is based upon the fact that it appears affirmatively not only that the secured debt was not due, but that the plaintiff was in possession of the goods, and no one was disputing his right of possession, at least, so far as the petition shows. And while it is true that the plaintiff had been garnished, yet the defendant, Bird, insists that that fact did not give the plaintiff a right of action against the garnishing creditors. And while it is also true that some of the creditors had levied upon the goods, and the plaintiff had replevied them, and the right of property was drawn in controversy as between the plaintiff and those creditors, yet it is

Match v. Bird.

only in the action in replevin, and the application for a receiver is not made in that action.

It is not to be denied, we think, that there is much force in these positions, and possibly we might conclude that the appellant ought to be sustained, but for a fact which remains to be stated. The appellee's mortgage contains a provision that he might take possession whenever he should choose to do so, and sell the goods at public auction, or so much thereof as should be sufficient to pay the amount due, or *to become due*, as the case might be, with all reasonable costs pertaining to the taking, keeping, advertising, and selling the said property. The design evidently was not only to give the appellee a right to take possession whenever he should deem it desirable to do so for his better protection, but to give him a right also to an immediate foreclosure in case he should elect to take possession. The property was of a kind that could not properly be locked up and kept out of market.

Now, while the plaintiff might have foreclosed without action, it was his right to foreclose by action, and we think that he was entitled to have a receiver who should proceed without delay to sell the goods in the ordinary course of trade. The petition shows, and it would perhaps be apparent without such showing, that a stock consisting of dry goods and notions must be sold in its season, and that to take the same out of market even for a short time, and interrupt the customary patronage of the store, would probably involve loss.

The appellant does not contend that it would be for the interest of any one that the store should be closed, the goods restored to the plaintiff, and held by him until the maturity of the debt, nor does he contend that it would be for the interest of any one that they should be advertised and sold at a forced sale. The stock, it appears, was a very large one, and we can easily conceive that the market might be such that if the stock was to be forced upon it, it was better to first re-

Marsh v. Bird.

duce it somewhat in the ordinary course of trade. We do not understand the appellant as contending that it would not. His idea seems to be that the stock should be restored to him, to be disposed of in the ordinary course of trade. But under the terms of the mortgage it was the appellee's right to hold the stock unless taken and disposed of by a receiver, and as he had been garnished by a large number of creditors, and, as it appears, for very large amounts, it was not to be expected that he would consent that the stock should be restored to the appellant to be disposed of by him.

It appears to us that there was sufficient ground for the appointment of a receiver. We come next to consider an objection pertaining to the mode of appointment.

2. RECEIVER: appointment: It is insisted that whatever grounds there may be for the appointment of a receiver, the appointment cannot properly be made without notice to the adverse party, and in this case it appears that the appointment was made without notice to the appellant. The statutory provision in regard to notice of the appointment of a receiver is to be found in the section of the Code above cited. The provision is that a receiver may be appointed "on such notice to the adverse party as the court or judge shall prescribe."

Where then the adverse party is within the jurisdiction of the court, and it is practicable to serve a notice upon him, it may be conceded that a notice of some kind ought to be given. But it is shown that the appellant was not within the jurisdiction of the court, but was in the State of New York. Now, it appears to us, that where the adverse party is not within the jurisdiction of the court, and cannot be served, or cannot readily be served with notice, the court may, under some circumstances, appoint a receiver without notice. If such appointment cannot be made, it can readily be seen that a great loss may sometimes occur. On the other hand no great danger is to be apprehended by appointing a receiver without notice to the adverse party. The notice in question is not the original notice of the action. No judg-

Malsh v. Bird.

ment or decree can be rendered until the adverse party is in court. He will in all cases have an opportunity to move to set aside the order of appointment, and will be entitled to have it set aside if the order was not judicious. Besides it is to be observed that it cannot be made in the first place unless the court is satisfied that the rights of the adverse party will not be unduly infringed. See section of Code above cited. That a receiver may be appointed without notice has never been expressly held by this court, but as having some bearing upon this question see *French v. Gifford*, 30 Iowa, 160, and authorities therein cited. The doctrine seems to be recognized that the court may appoint a receiver without notice, where it is shown in the petition that it is necessary for the court to do so to prevent a loss of property. In this case the petition shows very clearly that it was the appellee's right to either hold the stock or have a receiver. But for the appellee to hold the stock would necessarily result in closing the store, and that, we think, could not be done without loss.

In our opinion the court did not err in overruling the appellant's motion to set aside the order of appointment.

AFFIRMED.

Tice v. Derby.

TICE V. DERBY ET AL.

59 312
83 612
59 312
102 403
59 312
121 33

1. **Evidence: PRESUMPTION OF DEATH FROM ABSENCE.** Where a mother and her son (the plaintiff) were co-tenants of a city lot, and the mother, believing the son to be dead and herself the sole owner of the lot, sold, and undertook to convey it to the defendant's grantor, who, in good faith, improved it, *held* that although the plaintiff had disappeared and had been absent and unheard of for many years, and was believed by his mother to be dead, and although his mother's grantee purchased and paid for the lot in good faith, expecting to get a clear title to the whole of it, yet plaintiff's conduct was not such, as it appears from the evidence, as to estop him from asserting, as against the defendant, his interest in the lot.
2. **Tax Deed: TENANT IN COMMON.** A tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a co-tenant, notwithstanding the holder of the deed may have acquired the tax certificate before he became tenant in common, following *Flinn v. McKinley*, 44 Iowa, 68.
3. **Practice: RELIEF LIMITED BY DEMAND.** The court should not grant to either party, plaintiff or defendant, relief in any respect greater than he demands.

Appeal from Des Moines Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION to quiet title to a certain lot in the city of Burlington. The plaintiff avers that he is the owner thereof, subject to a life estate in an undivided two-thirds thereof, during the life of his mother, formerly Lucinda Tice, now Lucinda Burkhardt. The defendants, Mark Derby and Laura C. Derby, claim to own the whole lot.

The court found that the plaintiff owned the lot subject to an estate for life in one undivided third thereof, such estate being for the life of Lucinda Burkhardt; that the defendant, Laura C. Derby, is the owner of the estate for life, and is entitled to be allowed for certain improvements made on the premises, and the amount of certain taxes which had been paid; and the court decreed that an accounting be had, and the value of the property be ascertained, and the value of the

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improvements and the estate for life, and that the taxes which had been paid be apportioned, and the property be sold, and the proceeds be applied, first, in payment of the costs of the action and the balance be so divided as to pay Laura C. Derby so much as should appear to be her proportionate share for the estate for life, the improvements, and taxes paid by her, and those under whom she claims, after deducting such amount as would be the share of the rents and profits belonging to the plaintiff. From this decree both the plaintiff and the defendant, Laura C. Derby, appeal.

P. Henry Smyth & Son, for plaintiff.

Thomas Hedge, Jr., for defendant.

ADAMS, J.—The property originally was owned by the plaintiff's father, one John P. Tice, who died intestate, leaving surviving him his wife Lucinda, now Lucinda ^{1. EVIDENCE:} presumption of death from Burkhardt, and two sons, the plaintiff, and John P. Tice, Jr. The latter afterward died and the lot became the property of the plaintiff and his mother, Mrs. Burkhardt. The plaintiff disappeared and was not heard from for many years. The lot was unimproved and yielded no income. Mrs Burkhardt was poor and unable to pay the taxes, and suffered the lot to be sold for taxes. One Caroline Derby, the mother of the defendants, became the owner of the tax certificate. In the meantime, Mrs. Burkhardt, supposing her son, the plaintiff, to be dead, and herself the sole owner of the lot, sold it as such sole owner, and executed a deed whereby she undertook to make a conveyance of it. Such interest as she had the power to convey was acquired by Caroline Derby, and it appears that it was acquired while Mrs. Derby held the tax certificate, and before redemption expired. Mrs. Derby afterward obtained a tax deed, and supposing that she was sole owner of the lot built a dwelling house upon it. She afterward died, and the defendant, Laura C. Derby, her daughter, has acquired her interest by inheritance.

Tice v. Darby.

She insists that the plaintiff was divested of his interest by his mother's deed. Her position is based upon certain allegations, said to be supported by the evidence; that the plaintiff in disappearing and remaining unheard from so long, and under the circumstances shown, allowed his mother's grantee to purchase and pay for the lot in good faith, and under the just supposition that he was dead, and that he ought not now to be heard to aver to the contrary.

But we are all agreed upon a separate reading of the evidence, that while it appears clearly enough that Mrs. Burkhart's grantee purchased and paid for the lot in good faith, expecting to get a clear title to the whole of it, the plaintiff's conduct was not such as to create an estoppel against him. Mrs. Burkhart's deed, then, did not have the effect to convey the plaintiff's interest, and Caroline Derby became a tenant in common with the plaintiff, and was such at the time she obtained her tax deed.

The defendant, Laura, contends, however, that even if this is so, the plaintiff's interest was afterward divested by the tax deed. But under the ruling in *Flinn v. McKinney*, 44 Iowa, 68, a tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a co-tenant, and that too, notwithstanding the holder of the deed may have acquired the tax certificate before he became tenant in common.

As to the effect of Mrs. Burkhart's deed, and of the tax deed, it appears quite clear to us that there was no error in the practice: the ruling of the court below. But when we come to consider the extent of the plaintiff's interest, we find ourselves involved in some difficulty. The court decreed to the plaintiff a larger interest than he claimed. It gave him the lot subject to a life estate in one-third thereof, while the plaintiff claimed the lot subject to a life estate in two-thirds thereof. Yet no objection is urged by the defendant's counsel specifically upon this ground. Her counsel directs his whole argument to the point that the plaintiff has

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no interest whatever. We have to say, also, that several questions respecting the extent of the plaintiff's interest appear to have been wholly overlooked. The plaintiff's concession that the interest not owned by him is a life estate in two-thirds of the lot, was, we presume, based upon the idea that Mrs. Burkhart took a life estate in one-third when her husband died, and a life estate in another third when her son, John P. Tice, Jr., died. But counsel upon neither side have given any consideration in their arguments to the question as to what interest Mrs. Burkhart took, if any, at the death of her son. We shall, therefore, not undertake to determine it. But we think that we ought to say that the court should not have granted the plaintiff relief in any respect greater than what he claimed.

We come now to consider the questions raised on the plaintiff's appeal. He insists that the defendant, Laura, is not entitled to be allowed for improvements. Whether she might not be if the pleadings justified it, we need not determine. The defendant does not appear to have made such claim. She does, it is true, in the sixth division of her answer set out among other things that Caroline Derby built a house on the lot at an expense of \$1,100. But the matters set up in this division were pleaded by way of estoppel. It is abundantly manifest that they were relied upon simply to defeat the plaintiff's title. It will be time enough, we think, to consider whether the defendant can be allowed for improvements when she makes a claim for improvements.

The plaintiff contends, also, that the court erred in decreeing that the defendant was entitled to an allowance for taxes; and we have to say that we think that the plaintiff's position in this respect must be sustained. Whatever averments she has made concerning the payment of taxes, do not appear to have been made with the view of claiming an allowance, but solely with the view of defeating the plaintiff's title. She not only does not pray specifically to be allowed for such payments, but she makes no averment of the payment of any

German Bank v. Schloth.

specific amounts. What, if anything, the defendant should be allowed under a proper condition of the pleadings, we do not determine.

The decree below was not intended to be final. The case must be reversed upon both appeals, and remanded for such further proceedings as the parties may see fit to ask and the court deem it proper to grant. Each party must pay half of the costs of this appeal.

REVERSED.

59	316
88	490
59	316
101	301
59	316
104	350
59	316
106	443

GERMAN BANK ET AL. V. SCHLOTH ET AL.

1. **Mechanic's Lien: Assignment for Benefit of Creditors.** An assignee for the benefit of creditors has the right to enforce a mechanic's lien existing in favor of the assignors.
2. ——: CONTRACT WITH PARTNERSHIP: CHANGE OF PARTNERS: TRANSFER OF NOTES: LIEN KEPT IN FORCE. R., D. & H., partners, furnished the machinery for a mill under contract with defendants S. *et al.*, owners of the mill. Afterwards, and after the most of the machinery had been furnished, R. sold his interest in the partnership property and business to the other partners, D. and H., and M. was taken into the firm. Within a short time after this, D. likewise sold his interest to H. and M., who after that constituted the firm. With each of these changes the firm name was changed, and, at each transfer, the partners remaining assumed all the obligations and liabilities of their predecessors. H. & M. afterwards made a general assignment for the benefit of their creditors to G. Before the machinery of the mill was completed, and during the existence of the firm of R., D. & H., S. *et al.*, in consideration of said contract, executed their four notes to R., D. & H., which were transferred by indorsement to the German Bank—two of them as collateral security, and two of them were discounted. Two of these notes were renewed while in the hands of the bank, and made payable to D., H. & M., who then constituted the firm. After the assignment to G., he took up the notes held by the bank, and which had been dishonored by S. *et al.*, in order to discharge the indorsers, R., D. & H. and D., H. & M. After R. and D. had both transferred their interest in the firm, and after all the materials had been furnished, D., for R., D. & H., made affidavit to and filed their statement of account, claiming a mechanic's lien for R., D. & H. In an action by G. the assignee to foreclose the mechanic's lien, *held*:

German Bank v. Schloth.

1. That inasmuch as R., D. & H. made the contract with S. *et al.*, from which they were not relieved by the subsequent changes in the firm, R., D. & H. (and D. for them) were authorized to file the claim for, and to perfect their lien.
 2. That the lien thus perfected inured to the benefit of H. & M., the holders of the debt. [Miller's Code, § 2139; McClain's Statutes, p. 602, § 13; *Brown v. Smith*, 55 Iowa, 31.]
 3. That H., being a member of each successive firm, had all the time an interest in the debt, and a right to security by a mechanic's lien, which right was not limited to his share of the debt, but extended to the whole debt, and was for the benefit of himself and his partners.
 4. That G., the assignee of H. & M. might enforce the lien for the amount due on the notes, after the payee had indorsed the notes to the bank, and he had been compelled to take them up after their dishonor by the makers. Following the doctrine of *Farwell v. Grier*, 38 Iowa, 83, and overruling the *dictum* in *Scott v. Ward*, 4 G. Greene, 112, on this point.
 5. That although a part of the material was furnished and used after the machinery was running, and was not included in the notes, yet, as it was used to complete and perfect the machinery, and was reasonably within the contract for furnishing the machinery, the assignee was entitled to have the same included in the amount of his lien.
3. —— : **PRIOR MORTGAGE: APPLICATION OF PROCEEDS OF PREMISES.** Where materials are furnished and used for a building already erected and covered by a prior mortgage, and the whole premises do not sell for more than sufficient to pay off the prior mortgage, the proceeds must all be applied on the prior mortgage, according to the last clause of § 2135, par. 4, Miller's Code (McClain's Statutes, p. 600, § 9, par. 4), which clause must be construed as a *proviso* to the preceding language of the paragraph to which it belongs.
4. **Costs : APPEAL TO SUPREME COURT: AMOUNT AND PRIORITY OF LIEN.** In this case, where appellant succeeded in this court in having the amount of his lien increased, but failed in having it advanced over the lien of a prior mortgage, it was adjudged that appellant should recover the costs of the appeal, but that these costs should not be taken out of the proceeds of the property before the prior lien-holders have been fully paid.

Appeal from Dubuque Circuit Court.

WEDNESDAY, SEPTEMBER 20.

ACTION in chancery to enforce a mechanic's lien. The owner of the property, a mortgagee, and certain lien-holders, were

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made defendants. The lien of the intervenor for a part of the amount claimed was enforced by the decree, but made inferior to the mortgage and the other liens. The intervenor and the owner of the property appeal.

McCheney & O'Donnell, for plaintiff and the intervenor, appellants.

Robinson & Powers, for lien-holders, appellees.

Graham & Cady, for mortgagees, appellees.

No argument for the land owners, appellants.

BECK, J.—I. The German Bank filed the original petition in the case, alleging that it was the transferee of certain promissory notes, given by the owners of the property to the persons furnishing the machinery and materials used in constructing an oatmeal mill upon the lots which are charged in the lien. The circumstances under which the notes were executed and transferred, and the claim for a lien filed, will be hereafter stated.

The lot owners, Schloth and others, Charles Stafford, a mortgagee of the property, Burch, Babcock & Co., who held a claim for a mechanic's lien for lumber used in the building, and the Commercial National Bank, attaching creditors of the property owners, were made defendants. By the decree of the court, Burch, Babcock & Co.'s claim was declared to be the first lien, Stafford's mortgage the second, and the intervenor Graves, as to a part of the amount claimed by him, the third. The attachment of the Commercial Bank was declared to be inferior to the other liens. As this bank does not appeal, no question is presented to us involving its rights. Stafford does not appeal and contest the right of Burch, Babcock & Co. to priority, nor does Graves claim priority as to the defendant last named. Nor do we understand that there is any contest as to the amount of the lien

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of the parties other than Graves. He is not satisfied with the amount of his lien, as found by the court below.

While the lot owners, Schloth and others, have appealed, they have presented no argument in the case. They must be regarded as waiving, by their silence, objection to the decree of the court below.

It was admitted by all the parties that the machinery and improvements upon which the respective claims for mechanic's liens are based have become a part of the realty, and therefore the liens cannot be enforced by separating them from the lot.

It will be observed from the foregoing statement that the questions in the case involve the order of priority and the amount of Graves' lien. But, as will appear upon a further statement, the right to a lien upon his claim for any sum is denied. We are required, then, to determine whether he is entitled to a lien, and, if we find he is, what is its amount and order of priority. We proceed now to state other facts, which we find established by the record, upon which the questions involved in the case must be determined.

II. The machinery and material for which Graves seeks to recover were furnished under a contract made with Rouse, Dean & Co. The partnership was composed of Rouse, Dean & Hopkins.

Rouse transferred his interest in the partnership property and business to his partners, and subsequently McMurchy became a member of the firm, and within a short time Dean sold out to the other partners Hopkins and McMurchy. The style of the firm was changed with each of these changes of partners, but at each transfer the partners remaining in the business assumed all obligations and liabilities of their predecessors. The firm last named composed of Hopkins & McMurchy made a general assignment of all its assets for the benefit of all its creditors to the intervenor Graves. The machinery amounting to over \$4,000 was almost all furnished before Rouse went out of the firm; an inconsiderable

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amount was supplied afterwards. Before the work was completed, the lot owners executed to Rouse, Dean & Co. (the firm being unchanged at the time) four promissory notes amounting to \$2,224, which were transferred to the German Bank, two of them as collateral security and two were discounted. Two of these notes were renewed while in the hands of the bank and made payable to Dean, Hopkins & McMurchy, who then constituted the firm. Payment for the work was made, except the amount of these notes. These payments we think, were mostly made during the progress of the work. After the assignment to Graves, he took up the notes transferred to the German Bank, to discharge the indorsers Rouse, Dean & Co. and Dean, Hopkins & McMurchy. Thereupon he intervened in this action, setting up the facts and claiming to enforce the mechanic's lien. He takes the place of the German Bank in this action.

III. We will first inquire whether Graves, as assignee of Hopkins and McMurchy, is entitled to the benefits of the me-

1. MECHANIC'S LIEN : ASSIGNMENT FOR BENEFIT OF CREDITORS. chanic's lien for the machinery and materials furnished under the circumstances just stated. We do not understand that any question is raised involving the right of an assignee for the benefit of creditors to enforce a mechanic's lien existing in favor of the assignors. If Hopkins & McMurchy held a lien, their assignee can enforce it. We must inquire whether a lien was held by that firm. A further statement of facts now becomes necessary.

After Rouse and Dean had each transferred their interests in the firm, and after all the materials had been furnished,

2. CONTRACT WITH PARTNERSHIP : CHANGE OF PARTNERS. Dean, for the firm of Rouse, Dean & Co., filed their claim and account required to perfect and enforce the lien. In the instrument the lien is claimed by and for the benefit of Rouse, Dean & Co. It is insisted that this firm and the partner, Dean, had no such interest in the matter as entitled the firm to the lien and the partner to file the claim under the provisions of the statute.

It may be admitted that a stranger to the contract and one

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having no interest in the claim for materials furnished cannot file a lien therefor, nor make the affidavit required by the statute. And, on the other hand, it cannot be doubted that the holder of the claim, which in his hands may constitute the foundation of a lien, or one bound by the contract to furnish labor or materials, may do all things necessary to enforce the lien allowed by law.

Now, as we have seen, Rouse, Dean & Co. made the contract to furnish the machinery and materials in question. From this contract they were not relieved by the changes of the firm, nor by the succeeding partners and firms assuming and obligating themselves to perform their contract. Their successors in performing for them the contract became their agent and employes. It appears, therefore, plain that Rouse, Dean & Co. were authorized to file the claim for and perfect the lien.

But conceding the law to be that the assignee of an account is not entitled to a mechanic's lien thereon, does this rule apply so as to defeat the lien in the hands of Hopkins & McMurchy? We think it does not for two reasons.

1. We have just seen Rouse, Dean & Co. were authorized to perfect the lien. Now, under the statute and the decisions of this court, a lien after it is perfected by filing the claim, etc., may be assigned. Miller's Code, § 2139. McClain's Statutes, p. 602, § 13; *Brown v. Smith*, 55 Iowa, 31. The transfer of the firm's assets under which Hopkins and McMurchy acquired an interest in the claim will operate to transfer the lien after it is perfected. These transfers, as we have shown, did not defeat the right of Rouse, Dean & Co. to perfect the lien. The lien and the debt go together. The lien, therefore, enures to the benefit of the holders of the debt, Hopkins and McMurchy.

2. Hopkins was a member of each successive firm. He had all the time an interest in the debt, and a right to security by the mechanic's lien. At any time he could have perfected the lien for the protection of himself and those inter-

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ested with him in the debt. The law will not separate Hopkins' interest, in the debt from the interest of his co-partners. It does not limit the lien to his part of the debt, but will enforce it for the whole debt. A partner is authorized to collect a debt due the firm of which he is a member and to enforce all liens which secure it. If another partner has transferred his interest in the debt, the transferee must look to the partner enforcing the remedies for his share of the money when it is collected.

IV. We have discovered in our progress in the case thus far that the transfers of the partnership assets and interest,
3. — : and the formation thereby of successive firms,
^{transfer of notes : lien} is not such a transfer of the debt as will defeat
kept in force. the lien, and that the assignment to Graves does not have that effect. We must now inquire whether the transfer of the notes to the German Bank had that effect.

For the purpose of the case it may be conceded that the transfer of a note given for materials, etc., for which a lien is provided by law will, while the note is in the hands of a stranger to the original contract for the materials, defeat the lien. *Brown v. Smith, supra; Merchant v. The Ottumwa Water Power Co., 54 Iowa, 451; Scott v. Ward, 4 G. Greene, 112; Hawley v. Warde, Id., 36.*

The case under consideration is this: The lien-holder transfers the note, which is a negotiable instrument; and when it is dishonored by non-payment the indorsee lifts it by payment to the indorser. Can the lien-holder, the payee of the note, after he has received the note from the indorsee, enforce the lien? We think he can, for these reasons. He at no time was without interest in the note. He was responsible while it was in the hands of the indorsee as an indorser and that responsibility was accompanied by the liability of the maker to him. The contract of the indorser and maker run together. The indorser agrees to pay, if the maker does not; and the maker is bound to the indorser if he fails to pay the indorsee. These are subsisting contracts

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while the paper is in the hands of the indorsee. Like all other contracts they are only enforceable by action upon default by the parties bound. The maker all the time the note is in the hands of the indorsee is bound by this contract to the payee. We conclude therefore that the payee does not cease to become a party to the contract so as to waive any liens which accompany the note.

This position is strengthened by the consideration that upon default by the maker the indorser acquires the note under no new contract. When he lifts it, it becomes again fully and exclusively his property and he is authorized to strike out his indorsement. It appears that the indorsee's interest in the note is not of such exclusive character as to deprive the indorser of all interest and title therein. The title of the indorsee is so qualified as to permit the indorser to hold an interest in the note and a conditional title which becomes absolute upon payment made by him after dishonor of the paper. Now, surely no reason exists for a rule which defeats the lien accompanying the note when it is required by the indorser.

This court has held that the payee of a promissory note given for rent, being the landlord, may enforce his lien after he indorsed the note and was compelled to take it up after dishonor. See *Farwell v. Grier*, 38 Iowa, 83. That case and this, are not distinguishable. The statutes relating to liens of landlords and mechanics use the same words in conferring the rights to liens. Compare Code, § 2017, and Miller's Code, § 2130; and McClain's, Statutes, p. 596, § 3.

Scott v. Ward, 4 G. Greene, 112, recognizes a different doctrine announcing that the negotiation of a promissory note and its transfer defeats a mechanic's lien in an action by the payee after he has lifted the note upon failure of the maker to pay it. But the doctrine was announced *arguendo* without the support of reason or authority and was not necessary for the determination of the case. The case is clearly in conflict with *Farwell v. Grier*, *supra*, and, in our opinion,

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without the support of reason and legal principles. It must, so far as it conflicts with the views we have expressed, be regarded as overruled.

We conclude that by the transfer of the notes to the German Bank, the action by Graves to enforce the mechanic's lien is not defeated.

V. We are next to inquire as to the amount for which the lien of Graves may be enforced. A part of the material 4. ____ : was not included in the notes. It is insisted that amount of lien. these materials were used for repairs of the machinery after it was completed. Without admitting that a lien cannot be enforced for the repairs of the machinery, we are of the opinion that the materials were used, not for repairs but for completing the machinery. They were used some time after the machinery was running. But it often happens that changes and additions to machinery are found necessary after it has been used, in order to complete it. Materials used for such purpose are within the contract for furnishing the machinery.

We conclude that Graves is entitled to a lien for the amount of the account not included in the notes, added to the amount found due upon the notes, being the full amount remaining due and unpaid for the materials, work and machinery furnished by the firm of Rouse, Dean & Co., and its several successors as above stated.

VI. The machinery and material for which the lien is claimed, were put up and used in a building before erected, 5. ____ : and, as we have seen, it is conceded they became prior mort- a part of the realty. They thus became additions age: appli- to the building. Under Miller's Code, Sec. 2135, cation of pro- premises. par. 4; McClain's Statutes, p. 600, Sec. 9, par. 4, it is provided that in such cases, "if the premises do not sell for more than sufficient to pay off the prior mortgage or other liens, the proceeds shall be applied to the prior mortgage or other liens." Counsel for Graves argue that such a construction should be put upon the whole section, that upon a sale of the

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property, whatever sum may be realized, an accounting shall be had as to the enhanced value caused by the additions, and as to the value of the property before they were made, and the material-man shall have a prior lien upon the amount thus ascertained as to the enhanced value covered by the additions, and the mortgagee, or other prior lien-holder, shall have a prior lien upon the amount of the value of the property before the additions. But this construction is in conflict with the plain language of the provision above quoted. Counsel's arguments are based upon the justice of the construction, and the fact that it seems to be in accord with other provisions of the section. This may all be. The plain language we have quoted must be regarded as a limitation upon the language preceding it in the same section, to the effect that if the premises do not sell for more than enough to pay off the prior mortgage or other lien, the accounting and distribution of proceeds of sale shall not be required.

In this view it is not in conflict with any other words of the statute. We must enforce the provision as it reads and cannot wrest its meaning on the ground that another construction would be more equitable, and would not be in conflict with other provisions of the same statute. It must be admitted that par. 4, section 2135, is obscure and capable of adverse construction. The interpretation we adopt gives more nearly full effect to all its language, *ut res magis valeat quam pereat*. It also gives the language quoted the force of a proviso which has effect without being directly contrary to the purview of the statute, though limiting its application. This is the office of a proviso. A different interpretation would wholly nullify the language under consideration.

VII. The evidence shows that Burch, Babcock & Co.'s lien attached first, Stafford's mortgage second, and Graves' is third. The decree of the court below fixing this order is affirmed. The decree as to the amount of the judgments in favor of all the incumbrances except Graves will not be changed. He is entitled to recover the amount of the notes that are unpaid

Twing v. O'Meara.

and the amount of the account for the labor and materials not included in the notes. A judgment will be entered accordingly in his favor. Other provisions of the decree will not be disturbed.

Graves shall recover the costs of this appeal from Schloth and others, the owner of the lot. But these costs shall not be taken out of the proceeds of the property before the prior lien-holders, Burch, Babcock & Co. and Stafford, have been paid. A decree in accord with this opinion, may be, at the option of Graves, entered in this court.

MODIFIED AND AFFIRMED.

TWING v. O'MEARA.

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123 243
1. **Divorce: ALIMONY: JURISDICTION.** Where upon proper notice by publication the District Court obtained jurisdiction of a divorce proceeding, it thereby obtained jurisdiction of the cause for *all purposes*, including the allowance of alimony, so far as the subject-matter out of which the allowance was made was within the jurisdiction of the court.
 2. — : — : ATTACHMENT. In such a case, where an attachment was issued without any statutory ground therefor being stated in the petition and without the execution of an attachment bond, and on the hearing of the cause the attached property was awarded to the divorce plaintiff as alimony. *Held*—
 1. That the irregularity in the attachment could not be collaterally attacked by the divorce defendant in a suit against the grantee of the divorce plaintiff to quiet the title to the property.
 2. That the only effect of the attachment was to prevent the divorce defendant from alienating the property before a decree could be obtained, and that the title of the divorce plaintiff to the property was based wholly on the decree, and not at all on the attachment.
 3. That it was competent for the court to set apart to the divorce plaintiff a specific portion of the divorce defendant's real estate as alimony.
 3. — : — : JURISDICTION: PRACTICE. Where the divorce petition prayed only for such alimony as might be deemed equitable, *held* that the court had jurisdiction to set apart as alimony the specific property, although it was not particularly described and prayed for in the petition.

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Appeal from Scott District Court.

THURSDAY, SEPTEMBER 21.

THE plaintiff filed a petition alleging "That he is the fee simple owner of the north half of lot 2, in block No. 5, McIntosh's 2d addition to Davenport, and that, as he is informed and believes, the defendant, O'Meara makes a claim on said real estate adverse to said estate of your petitioner; that, theretofore, to-wit: on the 8th day of November, 1880, one Elizabeth H. Twing made and delivered her warrantee deed to said premises to defendant, which was on the 15th day of November recorded in book 40, town lot records of said county; that all the right, claim and title that said Elizabeth had to said property was obtained through a proceeding in the Circuit Court of Wapello county; that on the 7th day of January, 1879, she filed in the office of the clerk of Wapello county, Iowa, her petition against your petitioner for divorce and alimony and attachment as shown by certified copy of said petition with indorsements hereto attached and made part hereof, marked exhibit 'A.' That said petition was by said Elizabeth presented to the judge of the second judicial circuit of Iowa and by him indorsed before filing as follows:

"Let writs of attachment issue as prayed for the sum of two thousand two hundred dollars, as by law provided

ROBERT SLOAN, Judge.'

"And afterwards on the 7th day of January, 1879, said plaintiff in divorce suit caused to be issued by clerk of Circuit Court of Wapello county a pretended writ of attachment directed to the sheriff of Scott county, as shown by copy hereto attached and made a part hereof, which writ came into the hands of the sheriff of Scott county January 9th, 1879, who levied the same upon the aforesaid real estate, all of which appears by indorsement on said writ hereto attached and marked exhibit "B." That on the 8th day of January, 1879, plaintiff in divorce proceedings caused notice to be published, duly and legally done, for the proper time, 'in

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which petitioner asks a decree of divorce and for alimony against you; also asks an attachment against your property; and for cause charges adultery;' that proof of publication was duly made and filed March 12th, 1879. On the 13th day of March, being the fourth day of March term, said cause was by said court heard and decree entered in words and figures as set out in copy hereto attached, marked exhibit 'C' which decree was by the clerk of said court certified to the clerk of the District Court of Scott county and by him entered on the records of said court.

"Your petitioner shows the fact to be that he had no notice of the pendency of said cause; that all the notice that was given was by publication as aforesaid, and that he made no appearance, and no one appeared for him; and that the findings of said court are untrue, both as to causes for divorce and amount of property owned by him at the time; and your petitioner further shows that no bond was filed before or after the issuing of the pretended writ of attachment, nor was any order made by the court or judge that attachment issue without filing the bond required by law; nor was any other order made than that on the petition and herein set out; nor was any lawful cause for an attachment set out in the petition. And your petitioner further shows that said real estate was not described and set out in the petition of plaintiff in divorce proceedings, so as to bring the same before the court; nor was it set out and described in the pretended writ of attachment. Wherefore your petitioner says said writ was not a specific attachment, as contemplated in such cases made and provided.

"And your petitioner further shows that the relief granted in the said decree exceeded that which was demanded in the petition, in that no demand was made for the transfer of the said real estate. Wherefore petitioner shows that said attachment was issued in violation of law, and in violation of the order of said judge, and the same was void from the beginning, of no force or effect whatever, conferred no power or au-

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thority upon the sheriff of Scott county, and that any act under it is utterly void; that said real estate was not within the jurisdiction of said Circuit Court at the time of the making and entering of said decree, either by virtue of the petition, pretended attachment, service, or the notice as referred to in said cause, so that said court had not the power to divest your petitioner of the title to said real estate, and to invest in plaintiff in divorce proceedings the title thereto, and that no title was by said proceedings invested in said Elizabeth H. Twing, and that no title passed by her said deed from her to the defendant Thomas J. O'Meara, but only forms a cloud on the title of your petitioner. Wherefore petitioner prays that said O'Meara be made party defendant; that his pretended claim be removed from said premises as a cloud upon the title of petitioner, and the same be held invalid and of no effect; that he be barred and estopped from having or claiming any right, title or interest, in said premises adverse to petitioner, with judgment for cost and such other relief, etc."

The petition in the divorce proceeding referred to in the foregoing as exhibit "A" alleges that the defendant did, on or about the 26th day of October 1878, and at divers times, commit the crime of adultery, and that on October 26th, 1878, he deserted petitioner and left the State of Iowa; that defendant owns a house and lot in the city of Davenport, Iowa, to-wit: Lot No. — worth, probably, six hundred dollars. She further states that as she believes defendant is about to dispose of his property to defraud her. She therefore asks that an attachment be issued to the sheriff of Scott county, Iowa, where defendant owns property and where rents are coming in his favor; also that a writ of attachment be directed to the sheriff of Wapello county, Iowa, that debts due defendant may be attached. It is further alleged that the defendant, Alonzo L. Twing has absconded from the State of Iowa, so that personal service cannot be made on him in this State.

The petitioner prays that the bonds of matrimony exist-

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ing between her and defendant may be dissolved, and that she have a decree for such alimony as may be deemed equitable, and she states that such reasonable sum would be at least twenty-five hundred dollars. Exhibit "B" attached to the petition is an attachment in due form, with a return thereon, showing that it was levied upon the property in controversy. The decree of divorce, a copy of which is attached to the petition, finds that the petitioner is entitled to two thousand dollars alimony and vests in her the title to the real estate in controversy, the value of which is found to be six hundred dollars.

The defendant filed a demurrer to the petition, which was sustained. The plaintiff refused to amend and elected to stand upon his petition, and judgment was entered against him for costs. The plaintiff appeals.

D. P. Stubbs, for appellant.

S. E. Brown and A. W. Ford, for appellee.

DAY, J.—The appellant insists that the judgment decreeing the property in question to Elizabeth Twing is void and may be collaterally attacked, because no statutory ground of attachment is stated, and because no attachment bond was executed. We are of the opinion, however, that the court would have been justified in decreeing the property to Elizabeth Twing as alimony if no attachment had been procured. There was no necessity whatever for the attachment, except to prevent the defendant in that action from alienating his property before a decree could be obtained. The petition in this case concedes that notice of the divorce proceeding was duly and legally published. Section 2618 of the Code authorizes service by publication in an action for divorce where the defendant is a non-resident of the State of Iowa, or his residence is unknown. Section 2229 of the Code provides that, when a divorce is decreed, the court may make such order in relation to the children, property, par-

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ties, and maintenance of the parties, as shall be right and proper.

In *Harshberger v. Harhsberger*, 26 Iowa, 503, it is said "service of notice of publication may be made in actions for divorce. Alimony is an incident to divorce, and can only follow it, and the statute authorizing service of notice of publication, in an action for divorce, cannot fairly be construed to limit the power of the court, when service is thus made, to simply granting a divorce. It has jurisdiction of the *cause*, and may make all proper orders as to alimony, the custody of children, etc., which are incident to the divorce. Of course its orders as to alimony, when the service is by publication, would be binding only so far as the subject-matter out of which the alimony thus allowed was within its jurisdiction. If this court, upon such services, should render judgment for so many dollars as alimony, such judgment would not be held conclusive, and perhaps not even valid in a foreign jurisdiction." In *Harshberger v. Harshberger*, *supra*, although service of the notice was by publication, the court awarded the plaintiff alimony and made it a lien upon the real estate of the defendant situated in another county. This case is decisive of the question that when notice is served by publication the court acquires jurisdiction to allow alimony. That it is competent for the court to set apart to the plaintiff a specific portion of the defendant's real estate as alimony, see the following cases: *Jolly v. Jolly*, 1 Iowa, 8; *Inskeep v. Inskeep*, 5 Id., 204; *Cole v. Cole*, 23 Id., 433; *McEwen v. McEwen*, 26 Id., 375; *Zuver v. Zuver*, 36 Id., 190.

It is urged that the property is not described in the petition for divorce, and that the plaintiff did not pray that this specific property should be set off to her as alimony. In our opinion neither of these things is essential to the jurisdiction of the court. In the divorce proceeding the plaintiff asked that she have a decree for such alimony as may be deemed

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equitable. This prayer was sufficient to authorize the court to give the relief granted in the case.

In *Zuver v. Zuver, supra*, it was held that alimony could be granted even when there was no prayer for it. In our opinion the demurrer to the petition was properly sustained.

AFFIRMED.

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88	65
59	332
94	203
59	332
110	702
59	332
0118	728

JONES v. BRANDT.

1. **Husband and Wife: PERSONAL PROPERTY OF WIFE: STATUTES CONSTRUED.** Where plaintiff gave to her husband money, with the understanding that he was to use it to the best advantage, and to account to her for the money, with interest or profits, when required, and he invested it in real estate taken in his own name, *held*, that, though it be conceded that the money thereby vested in the husband "in favor of third persons acting in good faith and without knowledge of the real ownership," under section 2499 of the revision, yet that section has no application to parties who became creditors of the husband after its repeal and the enactment of section 2202 of the Code, and that, as to such creditors, the money did not vest in the husband, but constituted a debt which was a valuable consideration for the conveyance of real estate by the husband to the wife. (This point affirmed on rehearing.)
2. **EstoppeL: HUSBAND USING WIFE'S MONEY.** Where the wife allowed the husband to invest her money in real estate, thereby enabling him to obtain credit, but such real estate was exhausted in prior debts of the husband, of which the creditors had knowledge when they gave the credit, *held* that the creditors were not prejudiced by the wife's conduct, and that she was not estopped thereby from asserting her ownership of the money.
3. **Fraudulent Conveyance: EVIDENCE CONSIDERED.** Before a conveyance can be impeached for fraud, actual fraud, or fraud in fact, on the part, both of the grantor and grantee, must be shown, and the evidence in this case *held* not sufficient to establish such fraud.
4. **Judicial Sale: PURCHASER: NOTICE.** A purchaser at sheriff's sale is bound by constructive notice that the legal title is in one not the execution defendant.
5. — : ESTOPPEL. Plaintiff is not estopped from asserting her title to the property in question because she might have enjoined the sale under which the defendant claims, but did not. She was not bound, in law or equity, to protect defendant by such injunction.

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6. **Abatement: PENDENCY OF ANOTHER ACTION.** The pendency of another action to enjoin the sheriff and the execution plaintiff from selling the property was no bar to this action, by the same plaintiff, to quiet the title to the property as against a third person, who purchased at the sheriff's sale.
7. **Homestead: PROCEEDS OF: LIABILITY FOR DEBTS.** Whether the proceeds of a homestead shall become liable for debts depends always upon the manner of dealing with it. In this case the husband, who had the title to the homestead, exchanged it for a new homestead and the lot in controversy, but had all the property thus taken in exchange conveyed to his wife, *held* no fraud upon creditors of the husband, and they could not subject the lot to the payment of the husband's debts.

On rehearing former opinion adhered to.

Appeal from Polk Circuit Court.

THURSDAY, SEPTEMBER 21.

THE plaintiff brings this action to quiet her title to certain lands in the petition described. The defendant claims the land under judicial sales upon executions against George W. Jones, and alleges that George W. Jones caused the title to all of said lands to be placed in the hands of the plaintiff, his wife, for the purpose of defrauding his creditors. The court quieted the plaintiff's title, and canceled the sheriff's deeds under which the defendant claims the property. The defendant appeals. The facts are stated in the opinion.

Phillips, Goode & Phillips, for appellant.

Nourse, Kauffman & Co., for appellee.

DAY, J.—The property in controversy is a farm of 240 acres, a leasehold interest for ten years, from April 1, 1877, in the south two-thirds of lot two, in block twenty-three, in the city of Des Moines, together with a brick livery barn and other improvements thereon, and a lot on corner of Tenth and Sycamore streets, west Des Moines. The plaintiff claims the farm and the leasehold interest and the improvements thereon, under the same title. The lot on the corner of Tenth and Sycamore streets is claimed by the plaintiff under

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a wholly different title. It becomes necessary to consider these distinctive titles separately.

I. *As to the farm and the leasehold interest.*

In September, 1864, the plaintiff received from her uncle's estate and from her brother \$1,424.30. This money she gave to her husband, George W. Jones, with the understanding that he was to use it for her best interests, and account to her for it, with its interest and profits, whenever she desired. No writing was executed between the parties, and the plaintiff's husband did not make any entry of the transaction upon his books. George W. Jones, who was a banker in the city of Des Moines, put this money in the banking business, and so employed it till he sold the bank some time during the same year. In the spring of 1865, George W. Jones invested this money, together with money of his own, in the Griffith block, and lot 11, block A, in east Des Moines, paying therefor \$5,500. He talked with his wife about this investment, and she did not object to it. George W. Jones made considerable improvements upon the property, finishing up a building thereon and erecting additions thereto, and, in 1868, he sold a half interest therein to his brother John W. Jones, for \$9,000. In January, 1870, these parties procured a loan on this property of \$10,000, they and their wives joining in the execution of a mortgage thereon. This money was used in the erection of a brick hotel upon the property. It proved insufficient, and, in 1872, George W. Jones commenced negotiating for another loan of \$8,000, which was consummated in July, 1874. In order to procure this loan it became necessary, in addition to the hotel property, to mortgage two lots constituting a part of plaintiff's homestead, and all the other unencumbered property of George W. Jones, with the exception of one business lot, afterward deeded to Christy in trust. The plaintiff was very reluctant to mortgage any portion of the homestead, and consented to do so only after her husband had agreed to secure her for the money obtained from her, with its interest and profits.

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In November, 1876, the hotel property was traded to S. F. Spofford, for what is designated in the evidence as the Luse place. Spofford took the property subject to the two mortgages thereon, and agreed to release the property, other than the hotel property, included in the \$8,000 mortgage, within one year from the time of the trade. At that time Spofford was reputed to be worth \$70,000 to \$150,000, and was supposed by George W. Jones to be worth from \$75,000 to \$100,000. In 1878 the Luse place was traded for the Vierson farm of 260 acres in Marion county, worth about \$8,000. The deed to this property was made to the plaintiff, she executing a mortgage thereon for \$5,000 to be applied toward the removal of an incumbrance of \$7,000 on the Luse property. In addition to the farm, Vierson traded to George W. Jones certain personal property which was used in discharging the balance of the lien on the Luse place. The value of the interest which the plaintiff acquired in the Vierson farm was about \$3,000. At the time the conveyance was made, in addition to the incumbrance on the Luse place, which was satisfied out of the property obtained from Vierson, and the mortgages on the hotel property, which it was expected Spofford would pay, and the \$8,000 mortgage on the other property of George W. Jones, which Spofford agreed to release, George W. Jones was indebted about \$4,000, to secure a part of which he had deeded a lot to Christy worth about \$1,200. The evidence shows that at the time of the conveyance to the plaintiff, in addition to his homestead and the property conveyed to plaintiff, George W. Jones owned real estate of the value of about \$14,000, all of which was covered by a mortgage of \$8,000, which Spofford was under contract to release. The Vierson farm, subject to its incumbrance of \$5,000, was traded for the farm now in controversy, subject to an incumbrance of \$3,000, and the livery barn and lease, subject to an incumbrance of \$1,400. Spofford proved to be insolvent, and failed to discharge the mortgages either upon the hotel property or the other property of George W. Jones. The hotel

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property was sold at sheriff's sale to satisfy the \$10,000 mortgage, and the other property of Jones was sold in satisfaction of the \$8,000 mortgage, and thus he was reduced to a state of insolvency.

After the last mortgage was executed upon the hotel property, A. L. West, then doing a banking business in east Des Moines, loaned to George W. Jones \$800. In 1876 West went out of business and was succeeded by Christy, to whom the demand against Jones was turned over. Afterward, Christy made various other loans to Jones, and Jones, as already stated, deeded to Christy a lot worth about \$1,200, to be held in trust for the security of this debt. In June, 1877, Isaac Brandt went in partnership with Christy, and became interested in the claim against Jones. In October, 1877, the amount due from Jones being then \$2,750, was divided into several small notes, which were indorsed by Christy & Brandt to their creditors. Jones, together with Christy and Brandt, was sued upon these notes and judgments were recovered. The property in controversy was levied upon, and was purchased by Brandt in satisfaction of the judgments. Sheriff's deeds were executed to Brandt, under which he claims the property.

1. Did the money received by the plaintiff from her uncle and her brother, as to the creditors under whose claims

1. **HUSBAND** and wife : personal property of wife : statutes construed. the property in controversy was sold, vest in the husband, so that it could not afford a consideration for the conveyance to the plaintiff of the property in question? The idea that, as between the plaintiff and her husband, a gift of the property was intended, is negatived by the testimony. Both the plaintiff and her husband testify that the money was placed in the hands of the plaintiff's husband, to be used by him to the best advantage, and that he was to account for the money with interest or profits when required. Section 2499 of the Revision provides: "The personal property of the wife does not vest at once in the husband, but if left under his control

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it will, in favor of third persons acting in good faith, and without knowledge of the real ownership, be presumed to have been transferred to him, except as hereinafter provided." Section 2500 provides that the wife may avoid the entire surrender of her property to her husband, by filing for record with the recorder of deeds a notice of her claim. This notice was not filed, and hence the appellant insists that this property had vested absolutely in the plaintiff's husband before the conveyance to her was made. It is to be observed that section 2499 of the Revision does not provide that the wife's property shall vest in the husband, but that, as to third persons, under certain circumstances, it will be presumed to have been transferred to him. The evidence shows that the first installment of the indebtedness, under which the real estate in question was sold, was loaned to George W. Jones after both mortgages were placed upon the hotel property. The last mortgage upon the hotel property was executed in 1874, so that all of the debt now in question must have been contracted since the Code of 1873 went into operation. Nothing corresponding to sections 2499 and 2500 of the Revision is contained in the Code of 1873, but in lieu thereof the Code of 1873 contains the following provision:

"Sec. 2202. A married woman may own in her own right real and personal property acquired by descent, gift, or purchase, and manage, sell, convey and devise the same by will, to the same extent and in the same manner that the husband can property belonging to him."

As this money had not actually vested in the husband, under section 2499, except as to third persons acting in good faith, without knowledge of the real ownership, if indeed it had so vested as to them, see *Doyle v. McGuire*, 38 Iowa, 410, it follows that this section can have no application to parties who became creditors after its repeal and the enactment of section 2202 of the Code of 1873. Even under the Revision, in *Doyle v. McGuire*, 38 Iowa, 410, where the wife loaned to the husband a large sum of money, without a note

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or any contract in writing, upon his agreement that she should have security for the sums loaned upon the land in controversy, and where she filed no notice of her claim as provided in section 2500, it was held that the money loaned did not vest in the husband, but that it furnished a consideration for the conveyance of the land by the husband to the wife, and that a creditor of the husband could not impeach it. In this case it is said: "Under our law the right of the wife to loan money possessed by her in her own right, which has not vested in the husband, and to take security therefor upon lands, or to receive conveyances of land in payment, cannot be doubted. Neither can it be doubted that such contracts made in good faith with her husband are valid. * * *. The loans of Mrs. McGuire to her husband, if they were made in good faith, created a valid claim upon him, and to secure or pay it he could convey or mortgage his lands, or pledge in any lawful manner any interest in real estate held by him." See, also, in *Re Alexander*, 37 Iowa, 456.

In the case of *Brigham et al. v. Farocett*, the Supreme Court of Michigan held that a husband actually indebted to the wife, may, if acting in good faith, convey to her property not exempt in payment of his indebtedness, and that other creditors can not complain that the indebtedness, or a part thereof, was at the time barred by the statute of limitations, had the debtor seen fit to assert such defense. See 4 N. W. Rep., 272.

The appellant cites and relies upon *Watson v. Riskamire*, 45 Iowa, 281, and *Moore v. Orman*, 56 Iowa, 39. In *Watson v. Riskamire*, the alleged consideration for the conveyance was certain personal property consisting of horses, cows, sheep, a harness and wagon, and some household furniture, which the husband received from the wife's guardian in 1847 and 1849. There was no agreement that he was buying the property of his wife, but it was agreed he was to take it and handle it as his own, and pay her interest on it. It was held that this did not constitute a consideration for the

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conveyance of real estate to the wife in 1874. It is to be observed that this property was placed in the hands of the husband before the property rights of the wife were enlarged by statute, and when the common law rule prevailed that personal property of the wife reduced to the possession of the husband becomes the property of the husband.

The decision cannot be regarded as an authority in a case where the property was placed in the husband's hands subsequently to the enactment of the statutes which we have referred to above. In *Moore v. Orman*, Mrs. Orman obtained from her brother's and her father's estate, five or six hundred dollars, which she placed in her husband's possession in 1835. With this he purchased land and took the title in his own name. Under the law then in force the placing of the money in the husband's possession and allowing him to use it was a surrender of it to him. Besides, it is distinctly stated in that case that the evidence does not show that either Orman or his wife, at the time the money was placed in her husband's hands, expected to repay it, or made any provision for its repayment. The case is not at all applicable to the facts of the present case.

The case of *Lutz v. Mitchell*, 49 U. S., 580, relied upon by appellant, simply establishes a rule of evidence, and holds that "purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of the separate estate * * *. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her, which she must overcome by affirmative proof."

In this case the appellant concedes that "the proof puts it beyond any controversy that Mrs. Jones, in the fall of 1867, received from her uncle's estate, and her brother Ezra, about \$1,420 in money, and gave the same to her husband, George W. Jones, with the understanding, as they say, that he was to invest the same for her, and she was to have it back, or its

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proceeds, when she wanted it." The plaintiff has proved affirmatively and clearly that she placed the money in question in the hands of her husband, and that he agreed to account to her for it. Under our statutes and decisions a debt existed in favor of the wife against the husband, which would constitute a valuable consideration for the conveyance of real estate to the wife.

2. It is claimed, however, that the plaintiff, by allowing her husband to invest the money in the Griffith block, which

^{2. ESTOPPEL:} afterward became the hotel property, enabled her husband using wife's money. to obtain credit on the faith of this in-

vestment, and that she is now, as against creditors, estopped to assert her claim to the money. Upon this branch of the case appellant cites and relies upon *Humes v. Soruggs*, 94 U. S., 22; *McGinnis v. Curry*, 13 W. Va., 29; *Hocket v. Bailey*, 86 Ill., 74. In *Hocket v. Bailey*, it was held that if a wife allows her husband to use her capital as his own, to invest and reinvest the same in his own name, and thereby obtain credit on the faith of his being the owner of the same, she will not be allowed to interpose her claim to the property so acquired, to the injury of her husband's creditors. Without determining as to the correctness of the doctrine announced in the cases above cited, we are of opinion that, under the facts of this case, there can be no estoppel. When the debt was contracted under which the property was sold to the defendant, the parties giving credit knew that the hotel property was encumbered with two mortgages, amounting to \$18,000. When the hotel property was traded to Spofford for the Luse place, Spofford took the property subject to the mortgages. This property was afterward sold upon one of the mortgages, so that the creditors of Jones obtained the entire benefit of the hotel property. The Luse place was not saved out of the hotel property, but was acquired in addition. If then the creditors of George W. Jones relied upon his absolute ownership of the hotel property, they have acquired all that they counted upon, and hence, cannot

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insist that they will be injured by allowing the plaintiff to set up her claim to the money. As indicating the views of this court upon the question of estoppel, in a case bearing some analogy to the present, see *Crouse v. Morse*, 49 Iowa, 382. We unite in the opinion that the plaintiff is not estopped under the peculiar facts of this case.

3. There being a valuable consideration for the conveyance in question, it is not constructively fraudulent or fraudulent in law. Before the conveyance can be impeached, actual fraud, or fraud in fact, upon the part of both grantor and grantee, must be shown. Actual fraud cannot be presumed, but must be established, either by positive or circumstantial evidence. There is no positive proof that either the grantor or grantee in this case, intended to defraud the creditors of George W. Jones. George W. Jones testified as follows:

"The trade between me and Col. Spofford, referred to in the exhibit to the amended replication, was made November 10, 1876. It was reported to me by his agent, and he gave it to me upon his word and honor, that Col. Spofford was worth \$150,000. When that trade was made, I heard Spofford estimated all the way from \$70,000 to \$150,000. I supposed that he was worth at least \$75,000 or \$100,000. * *. At time of trade for Vierson farm I had not the most remote idea that Spofford would not be able to pay out. I thought him entirely responsible. I had no intention of hindering, delaying or defrauding my creditors in deeding the property to my wife." The plaintiff also testified: "I received that deed with no fraudulent intent and with no intention of hindering or delaying the collection of any debts against my husband."

In our opinion the circumstances proved do not show the conveyance to have been actually fraudulent. At the time of the conveyance of the Vierson farm to the plaintiff, the money which she placed in the hands of her husband amounted, at eight per cent simple interest, to \$2,934. The interest

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which she received in the Vierson farm above the mortgage which she placed upon it, amounted to about \$8,000. At that time Spofford was considered solvent, and George W. Jones was justified in believing that he would pay off the mortgages upon the hotel property, and release the other property from the \$8,000 mortgage, as he agreed to do. If Spofford had performed his agreement, George W. Jones, aside from the property conveyed to his wife, would have had about \$10,000 worth of property, in excess of enough to pay his debts. We cannot, under these circumstances, say that a conveyance of property of the value of \$3,000 to his wife, in payment of an actual indebtedness of that amount, was an actual fraud upon his creditors.

4. Appellants place great stress upon the fact that the plaintiff, in her amended reply, alleges that upon the conveyance of the hotel property for the Luse place she acquired and held an equity in the Luse farm, which was subsequently settled by the conveyance to her of the Vierson farm. It is said that the existence of an equity in the hotel property and the Luse place is inconsistent with the existence of a debt in favor of plaintiff against her husband. If this should be conceded, we are unable to see how it would aid the appellant's case. Before the judgment under which the defendant claims had been recovered, the legal title had become vested in the plaintiff, and her equitable estate, if she had one, had become a legal estate. The defendant purchased at the sheriff's sale, with notice, at least constructive, of that fact. A purchaser at a sheriff's sale, without notice, is protected against latent equities, but not a mere creditor. See *Gower v. Doheney*, 33 Iowa, 36; *Halloway v. Platner*, 20 Id., 121; *Bell v. Evans*, 10 Id., 353; *Welton v. Tizzard*, 15 Id., 495.

5. The property in controversy was levied upon under execution and advertised for sale on the 7th day of January, 1879. On the 4th day of January, 1879, this plaintiff filed petitions in the Circuit Court mak-

4. JUDICIAL
sale : pur-
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tice.

5. _____.
estoppel.

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ing the sheriff and the judgment plaintiffs defendants, alleging her absolute ownership of the property, and praying an injunction against the sale thereof, under the executions in the hands of the sheriff. These cases were set for hearing on the 6th day of January, 1879. They were never tried upon the merits, but on the 11th day of August, 1879, they were dismissed by the plaintiff. In the meantime the sheriff's sale proceeded and the defendant Brandt became the purchaser. This action was commenced on the 19th day of March, 1879.

First. Appellant insists that the plaintiff, having stood by and permitted the defendant to purchase the property, when she might have prevented the sale thereof by injunction, has waived and abandoned all claim to the property. But the plaintiff's deed was of record, and Brandt had, at least, constructive notice thereof. The plaintiff was under no legal nor equitable obligation to protect him by preventing the sale.

Second. It is insisted that, at all events, the pendency of that suit was an insuperable objection to the bringing of this

6. ABATE-
MENT : pen-
dency of an-
other action. action on the 19th of March, 1879. We are un-
able to see, however, how the pendency of an ac-
tion against the sheriff, and the judgment plaint-
iffs, could be an insuperable barrier to the commencement
of an action against the defendant, who, notwithstanding the
pendency of the action, had become a purchaser of the prop-
erty. In our opinion the court did not err in quieting the
plaintiff's title to the farm and livery barn and lease in ques-
tion.

II. *As to the lot on the corner of Tenth and Sycamore
streets, west Des Moines.*

The plaintiff and her husband owned and occupied a home-
stead in east Des Moines. In May, 1878, this homestead
7. HOME-
STEAD PRO-
CEEDS OF : lia-
bility for was exchanged with McLain for a new home-
stead in west Des Moines, which was deeded to
the plaintiff. In addition to this new home-
stead McLain gave in exchange for the old homestead \$300

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in money, and the lot now in controversy, which forms no part of the new homestead, but is situated a block and a half from it. This lot was also deeded to the plaintiff directly by McLain, upon consideration, she testifies, of her signing the deed to the old homestead. This lot was sold under execution, upon a judgment rendered against Geo. W. Jones, April, 16, 1878, and was purchased by the defendant. The old homestead was exempt from the debts of Geo. W. Jones. He could lawfully have conveyed that homestead to his wife or exchanged it for another of equal value and caused it to be conveyed to his wife. If he had done so, the creditors would have had no just ground of complaint. If the old homestead had been conveyed to the plaintiff, and then exchanged for the new homestead, and the lot in question, it is clear, it seems to us, that the creditors of Geo. W. Jones could not have subjected the lot to the payment of his debts. It is apparent, therefore, that the creditors of Geo. W. Jones had no legal claim upon the old homestead. They cannot claim that it is a fraud upon them that they have been deprived of its proceeds. Appellants insist that the case is just the same as though the lot in question had been conveyed to Geo. W. Jones, and by him conveyed to the plaintiff. With equal propriety it might be claimed that the case is the same as though the old homestead had been conveyed to the plaintiff and by her conveyed in exchange for the new homestead and the lot in question. It is said that if the lot in question had been conveyed to Geo. W. Jones, the judgments against him would at once have become a lien upon it. This must be conceded. Whether the proceeds of a homestead shall become liable for debts depends always upon the manner of dealing with it. If the homestead should be exchanged for another, the new one would be exempt, but if it should be exchanged for a stock of merchandise, it would not be exempt. It does not advance the claim of appellant to say that the lot in question would have been liable for the husband's debts if the course of dealing respecting it had been

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different. The controlling facts in this case are that the title to the lot never was in the husband, and the conferring of the title upon the wife placed the creditors in no worse condition than they were in before. Under these circumstances we think the lot cannot be subjected to the payment of the debts of the plaintiff's husband, upon the ground that this conveyance as to them was fraudulent. See *Delashmut v. Trau*, 44 Iowa, 613, and *McTighe v. Bringholz*, 42 Id., 455.

AFFIRMED.

ON REHEARING.

ROTHROCK, J.—After the foregoing opinion was filed a petition for rehearing was presented in which counsel for appellant, with great earnestness, insisted that the opinion was essentially wrong. Upon reading the petition for rehearing some of us were led to doubt the correctness of the second point of that part of the opinion which determines the rights of the parties in the farm and lease hold interest. It is there stated that when the debt was contracted, under which the property was sold to the defendant, the parties giving credit knew that the hotel property was incumbered by two mortgages amounting to \$18,000. And elsewhere in the opinion it is stated that the first installment of the indebtedness under which the real estate was sold was loaned to Geo. W. Jones after both mortgages were placed on the hotel property. It is contended that this last statement of fact is contrary to the evidence. We have carefully re-examined the abstract of evidence and conclude that the opinion is correct. The evidence as to the date of the loan is to be found in the testimony of A. L. West. We need not repeat it here. He plainly states that when he loaned the money to Geo. W. Jones the hotel property was incumbered to the amount of \$18,000. The idea that the witness had reference in his testimony to renewals of previous loans finds no support from the record. The fact remains that all the indebtedness for which the property was sold, at sheriff's sale to Brandt,

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was contracted after the Code of 1873 went into operation. But it is true that this indebtedness was increased, and new loans made to Geo. W. Jones after he had exchanged the hotel property for the Luse place. The contract for this exchange was made in November, 1876, and on December 12th, 1876, the loan was increased from \$1,000 to \$2,000, and on May 15th, 1877, an additional loan of \$575 was effected.

As to at least part of the indebtedness, the theory of the opinion that the creditors of Geo. W. Jones relied upon his ownership of the hotel property is not correct. If any reliance was had upon any property for the indebtedness last incurred it was upon the Luse place. But all of this indebtedness arose since the enactment of the Code of 1873, and under its provisions "a married woman may own in her own right real and personal property acquired by descent, gift, or purchase, and manage, sell, convey and devise the same by will to the same extent and in the same manner that the husband can property belonging to him." There was, then, at the time these loans were made to Geo. W. Jones an indebtedness from him to his wife which both of them recognized as valid and binding and founded upon an actual money consideration. There was no statute requiring any notice of this indebtedness to be given to the public nor the creditors of Geo. W. Jones. If the debt had been due from Jones to a third person a creditor of Jones could not be allowed to impeach a conveyance of property in payment of the debt, because he did not know of such indebtedness. Why should he be allowed to do so because the wife is the creditor who is preferred? It is correct that transactions of this kind between husband and wife are required to be scrutinized closely because of the relation of the parties. But when the husband is honestly indebted to the wife, he has the right to pay the debt, and the wife may receive payment the same as any other creditor, and such payment may be made by a conveyance of property, no lien thereon having attached. It appears to us that the case of *Crouse v. Morse*, 49 Iowa, 382, is conclusive on this question.

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The petition for a rehearing reiterates the argument that the pleadings and evidence do not show that the relation of debtor and creditor existed between Geo. W. Jones and wife after the purchase of the hotel property, but that thereafter she had an equity in the property which she should have protected by taking an agreement, or deed thereto, to the extent of her money invested in it, and that because she did not do so the money given to her by her husband must be regarded as a gift to him. The ready answer to this claim of counsel is that this whole record excludes the idea that Ellen W. Jones ever claimed an equity in any of the property in the sense of being the owner of any interest therein. There never was any relation between her and her husband as to her money other than debtor and creditor. It is true the rights she asserts are named in her pleadings as her equities in the property. But in the same connection she explains her equities to be her right to be repaid the money placed in her husband's hands in 1864, with its proper interest for earnings and profits. And all through the testimony of both Geo. W. Jones and Ellen Jones it is apparent that there was no arrangement that she was to have any equitable interest in any specific property, but that her money was to be invested by her husband and she was to be repaid by him. We do not deem it necessary to discuss other objections made to the original opinion by counsel for appellant. They have been heretofore fully considered and we can discover no reason requiring a change in any conclusion formerly reached, nor of further elaboration of the other points in the case, and we unite in the opinion that the former order of affirmance must be adhered to.

Woodbury, Williams & English v. Roberts.

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WOODBURY, WILLIAMS & ENGLISH v. ROBERTS.

1. **Promissory Note: TIME OF PAYMENT UNCERTAIN: NOT NEGOTIABLE.**

When an instrument is not certain, or is not capable of being made certain, as to the time of payment, the law does not regard it as negotiable paper.

Appeal from Des Moines Circuit Court.

THURSDAY, SEPTEMBER 21.

ACTION upon a promissory note. The cause was submitted to the Circuit Court upon the question of the negotiability of the note, under a written stipulation of the attorneys of the parties, and the court decided that the instrument is not negotiable. Plaintiffs appeal.

Newman & Hake, for appellants.

Whiffin & Brown, for appellee.

BECK, J.—The only question in the case involves the negotiability of the note in suit, of which the following is a copy:

“\$300. DALLAS TOWNSHIP, Iowa, March 18, 1880.

“Three months after date, I promise to pay to the order of Warren Roberts three hundred dollars, at the First National Bank of Burlington, Iowa, value received, with interest at ten per cent per annum, including attorney’s fees and all costs of collection.”

“The makers and indorsers of this obligation further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely as he or they may see fit.” (Signed) “WARREN ROBERTS.”

“Indorsed on the back, WARREN ROBERTS.”

When an instrument is not certain, or is not capable of being made certain, as to the time of payment, the law does not regard it as negotiable paper. By the terms of the con-

Woodbury, Williams & English v. Roberts.

dition of the note in suit it would never fall due, but could be indefinitely extended at the will of the maker and indorser, who, it will be observed, is the same party. When the instrument was executed the time of its maturity was contingent upon the option of the maker of the note. It was impossible to determine when it would become due by the assent of the maker. The time of payment was uncertain and was not capable of being made certain. Nothing happened after its execution to remove this uncertainty.

Notes, which by their terms are payable on or before a fixed time or a specified event, are, it is true, uncertain as to the time at which they are payable. But there is no uncertainty as to the time when they become absolutely due. Paper of this character is regarded by the courts as negotiable. But the note before us may never fall due, for payment may be extended indefinitely.

The rules applicable to commercial paper were transplanted into the common law from the law merchant. They had their origin in the customs and course of business of merchants and bankers, and are now recognized by the courts because they are demanded by the wants and convenience of the mercantile world. Surely these rules ought not to be extended to paper, the like of which was never heard of in mercantile transactions. What business man would expect a banker to discount his paper in the form of the note in question in this case? What merchant ever offered to give or was asked to receive a promissory note containing a like condition? We may safely say that notes of this kind are unknown to commercial transactions. Why, then, extend to them the rules of the commercial law?

By regarding such paper as non-negotiable no prejudice will result to the mercantile and financial business of the country, but sharpers will be defeated in their attempts to swindle the confiding and unwary, a result in accord with sound public policy and good morals.

Miller v. Poage, 56 Iowa, 96; *Smith v. Van Blarcom*,

McKeever v. Jenks.

8 N. W. Rep., 90, support the conclusions we have reached that the note in suit is not negotiable. The case last named holds a note to be non-negotiable which contains the precise condition found in the note before us.

The judgment of the Circuit Court is

AFFIRMED.

McKEEVER ET AL. v. JENKS ET AL.

1. Fences: APPEAL FROM FENCE VIEWERS: NOT ALLOWED. The statute has not provided for an appeal from the action of fence viewers to the Circuit Court; and in the absence of such provision such appeal cannot be allowed. Section 162 of the Code does not apply.

Appeal from Clark Circuit Court.

THURSDAY, SEPTEMBER 21.

At the request of plaintiffs the fence viewers of the proper township determined the sufficiency and value of a hedge grown by plaintiffs upon the line dividing their land from land of defendants. From the action of the fence viewers in the proceedings defendants appealed to the Circuit Court, where the appeal was dismissed upon the ground that it is not authorized by the law. From the decision of the Circuit Court defendants appeal to this court.

Stuart Bros. and McIntire Bros., for appellants.

Temple & Tallman, and J. Chaney, for appellees.

BECK, J.—I. The proceedings of the fence viewers from which defendants attempted to appeal are the same involved in the preceding case between the same parties. (See *ante*.) The opinion in that case is referred to for facts not stated in this opinion, if there be any, which are necessary for an understanding of this case.

McKeever v. Jenks.

The only questions we are now required to determine involve the right of the parties to an appeal in cases of this character.

II. The remedy by appeal from the action of fence viewers is not provided for by statute. In the absence of statutes providing therefor, appeals cannot be allowed.

Council for defendants insist that appeals to the Circuit Court in cases of this character are authorized by Code, section 162, which is in the following language:

"The Circuit Court shall have and exercise general original jurisdiction, concurrent with the District Court, in all civil actions and special proceedings, and exclusive jurisdiction in all appeals and writs of error from inferior courts, tribunals, or officers, and a general supervision thereof in all civil matters to prevent and correct abuses where no other remedy is provided."

This provision does not permit appeals in cases where there is no statute authorizing them. The Circuit Court under this statute is clothed with jurisdiction of appeals from inferior courts, tribunals and officers, where appeals are allowed, and it has "a general supervision" over such courts, tribunals and officers "in all civil matters to prevent and correct abuses, where no other remedy is provided." But the jurisdiction here conferred must be exercised in the manner provided by law. This statute does not authorize the Circuit Court to grant relief where no remedy is provided by law. Counsel's construction, if adopted, would authorize appeals to the Circuit Court from all inferior courts, tribunals and officers to prevent and correct abuses, where no remedy is provided. We would, under this construction, have appeals without number from township, county and other officers, and the Circuit Court would thus become their general supervisor, an obviously absurd result.

The Circuit Court correctly ruled in dismissing defendants' appeal.

AFFIRMED.

Town of Toledo v. Edens.

TOWN OF TOLEDO v. EDENS.

1. **Municipal Corporations: TOWN ORDINANCE: TWO MILE LIMIT.** In February, 1878, and before chapter 119, acts of 1878, became a law, the town passed an ordinance providing "that no person shall sell within the limits of said town, or of any territory over which the town may have jurisdiction for that purpose, any beer or wine, or any malt or vinous liquors * * * * without first procuring from the mayor a license, etc.," and defendant sold beer in September, 1878, outside of, but within one mile of the corporate limits of, the town: held that the ordinance applied to the two mile limit over which the town subsequently obtained jurisdiction by said statute, and that defendant was properly found guilty thereunder.
2. **Constitutional Law: STATUTE CONSTRUED.** Chapter 119, acts of 1878, extending the jurisdiction of cities and towns, for the purpose of regulating, prohibiting and licensing the sale of ale, wine and beer, two miles beyond the limits of such corporations, held constitutional and valid. Following *State v. Schroeder*, 51 Iowa, 197, and *Town of Centerville v. Miller*, Id., 712.
3. **Criminal Law: FINE NOT EXCESSIVE.** The ordinance being valid, and providing a fine for its violation of not less than \$50, a fine of \$50 imposed for its violation cannot be considered excessive.

Appeal from Tama District Court

THURSDAY, SEPTEMBER 21.

THIS is a prosecution under an ordinance of the town of Toledo, charging the defendant with selling beer within two miles of the corporate limits of the town. The case was originally tried before the mayor of the town, and the defendant was found guilty. An appeal was taken, and upon a trial in the District Court he was again convicted, and he appeals.

L. J. Blum, for appellant.

J. H. Merritt, for appellee.

ROTHROCK, J.—I. In February, 1878, the town passed an ordinance providing "that no person shall sell within the limits of said town, or of any territory over which the town

Town of Toledo v. Edens.

may have jurisdiction for that purpose, any beer or wine or any malt or vinous liquors, the sale of which is not prohibited by the laws of the State of Iowa, without first procuring from the mayor a license, etc."

On the 3d day of September, 1878, the defendant sold beer outside of, but within one mile of, the corporate limits of the town, and without any license to make such sale.

Chapter 119 of the acts of 1878 became a law on the 4th day of July of that year, and it contains the following among other provisions:

"SEC. 9. The power and jurisdiction of every municipal corporation, whether acting under general or special charter, to regulate, prohibit and license the sale of ale, wine and beer, and of the courts and officers thereof to enforce said regulations, is hereby extended two miles beyond the city limits of said corporation, * * * * ."

The question to be determined is, did the ordinance in question operate to prohibit unlicensed sales within two miles of the city limits? We think it did. The section above quoted is an absolute extension of the jurisdiction of the city to all points within the two miles limit, and an absolute extension of the jurisdiction and power of the courts and officers of the city two miles beyond the city limits. If an ordinance be enacted and afterward the city limits be extended by adding thereto adjacent territory, no one would contend that a new ordinance must be passed in order to be operative in the newly acquired territory.

We can see no difference between that case and this. By this law the extension of the power and jurisdiction is absolute. It does not depend on any act or ordinance of the city specially adopting or invoking the power. If the ordinance had been passed after the law went into force it would not have been necessary that it should specify that its operation extended two miles beyond the city limits. It is so extended by the express provision of the law.

II. It is urged that the law in question is unconstitutional.

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We have held it to be a constitutional and valid enactment. *State v. Schroeder*, 51 Iowa, 197; *Town of Centerville v. Miller*, Id., 712. We have no disposition to recede from the ruling in those cases. Counsel present no new objection to the act which we regard as of sufficient importance to discuss.

III. The ordinance provided as a penalty for its violation a fine of not less than \$50 nor more than \$100. The court assessed a fine of \$50, which is claimed to be excessive. As we hold the prosecution was properly commenced, and carried on under the ordinance, the fine could not have been in a less amount than that fixed by the court.

AFFIRMED.

LUCAS COUNTY v. WILSON.

1. **Appeal: FROM ORDER CHANGING PLACE OF TRIAL.** While this court has held (see cases cited) that an appeal will not lie from an order changing the place of trial, yet when, as in this case, such a motion is made and by mutual understanding is treated by counsel and by the court below as a demurral involving the merits of the case, it will be so treated here, and the appeal will be entertained.
2. **Practice: VENUE IN ACTION ON APPEARANCE BOND.** Where a bond was given for the appearance of the defendant in a criminal action in the court of a certain county, and the place of trial was afterwards changed to the court of another county, *held* that an action on such bond must be brought in the latter court, and that it was error for the latter court to sustain a motion for change of venue to the former court. Following *Decatur County v. Maxwell*, 26 Iowa, 398.

Appeal from Lucas District Court.

THURSDAY, SEPTEMBER 21.

A. J. WILSON was indicted in Ringgold county and the defendant gave a bond or *undertaking* for the appearance of the said Wilson to answer the charge against him. Afterwards the venue in the criminal proceeding was changed on the application of the defendant therein to the District Court of Lucas county. A. J. Wilson failed to appear in the last

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named court and county, and this action is brought to recover on the undertaking. On motion of the defendants the place of trial was changed to Ringgold county, and plaintiff appeals.

Mitchell & Penneck and *R. B. Townsend*, for appellant.

Laughlin & Campbell, for appellee.

SEEVERS, CH. J.—I. Counsel for the appellee have filed a motion to dismiss the appeal on the ground that none lies ^{from order changing place of trial.} from an order changing the place of trial. It was so held in *Allerton v. Eldridge*, 56 Iowa, 709 and *Groves v. Richmond*, 58 Iowa, 54. But those cases are different from the one now before us. In the present case the motion was filed to change the place of trial because the defendant was a resident of Ringgold county, and it was agreed in open court by counsel “that the object of the motion was to alone test Lucas county’s right to at all sue on the bond.” It was further agreed that “if the suit was brought in the wrong county, then that Lucas county could not at all maintain the action in any court and was not entitled to have any money that should have been due on said bond, but if Lucas county should be entitled to the money due on the bond, then, that the suit was properly instituted in this court.” It is evident from the foregoing statement the motion was treated by counsel and the court as a demurrer, which raised the question whether or not the plaintiff was entitled to recover. The motion therefore involved the merits of the action, and the court held that the plaintiff could not “recover any portion of the money due on said bond, but that Ringgold county is entitled to the same

* * * and sustained defendant’s motion to change to Ringgold county.” Therefore the “plaintiff refused to plead further,” etc. The case should be determined here as the parties saw fit to present it to the court below. As the motion was treated as a demurrer involving the mer-

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its in the District Court it will so be done here. It therefore follows that an appeal lies and the motion must be overruled.

II. The bond was conditioned "that the said A. J. Wilson shall appear and answer said indictments and abide the

^{2. PRACTICE:} orders and judgments of said court and not depart without leave of the same, or if the said bond.

A. J. Wilson fail to perform either of these conditions we will pay the State of Iowa the sum of twenty-seven hundred dollars. A recovery upon this bond must be had if at all because the defendant therein undertook that Wilson would appear in the District Court of Lucas county and abide its rulings. The case, therefore, in no manner differs from one where the bond in terms provided the person indicted should appear in a county other than that in which the indictment is found. The Code, section 4599, provides the action on such "undertaking must be in the court in which defendant was or would have been required to appear by the undertaking." Now, as a recovery must be had, if at all, because of the failure of the person indicted to appear in Lucas county, we think the action under the statute must be brought in that county, and it was so held in *Decatur County v. Maxwell*, 26 Iowa, 398. The statute is the same now as it was when that case was determined. It follows the court erred in sustaining the motion to change the place of trial.

REVERSED.

State v. Connor.

STATE V. CONNOR.

1. **Criminal Law: ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER.** The defendant being on trial on an indictment for an assault with intent to commit *murder*, held that it was not error for the court to instruct the jury that upon certain conclusions as to the evidence they would be justified in finding the defendant guilty of an assault with intent to commit *manslaughter*--the lesser crime being necessarily included in the greater, following *State v. White*, 45 Iowa, 325.
2. **Instructions: PRACTICE.** It is not error to refuse to give an instruction asked when another instruction given to the jury by the court covers substantially the same ground.

Appeal from Wapello District Court

THURSDAY, SEPTEMBER 21.

THE defendant was indicted for the crime of an assault upon one Ryan with intent to commit murder, and was convicted of an assault with intent to commit manslaughter. Judgment having been rendered upon the verdict he appeals.

H. B. & L. C. Hendershott, for appellant.

Smith McPherson Attorney-general, for the State.

ADAMS, J.—I. The court gave an instruction in these words: "If you find from the evidence that the defendant at the time and place charged in the indictment unlawfully assaulted said Ryan with a pistol and shot him in the breast, and you further find that said assault was made upon reasonable provocation in the heat of blood, but without malice, and without legal excuse, and with the intent to kill, then you would be justified in finding the defendant guilty of an assault with intent to commit manslaughter." The giving of this instruction is assigned as error.

The question presented received a very careful consideration in *State v. White*, 45 Iowa, 325. Without claiming

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that the decisions are uniform, or that the objections urged by the learned counsel for the appellant are without weight, we have to say that we see no sufficient reason for departing from the rule adopted; and the instruction must be approved.

II. The defendant asked the court to give an instruction in these words: "The burden of proof is upon the State to show, from the circumstances attending the commission of the offense, that the defendant did not act in self defense, and if the jury have a reasonable doubt on this question the defendant is entitled to that doubt, and your verdict should be not guilty." This instruction the court refused to give, and the refusal is assigned as error.

In our opinion the eleventh instruction given by the court in respect to self defense covered substantially the one asked. That instruction is in these words: "If you find from the evidence that the defendant acted in self defense, or if after considering all the evidence you have a reasonable doubt as to whether he acted in self defense or not, you should acquit."

Had the instruction asked been given the result could not have been different. The jury must have believed from the evidence, beyond a reasonable doubt, that the defendant did not act in self defense. He suffered nothing by a failure to instruct more specifically in regard to the burden of proof.

We see no error in the rulings of the court, and the judgment must be

AFFIRMED.

Reed v. Root.

REED v. ROOT.

59	359
55	225
55	445
59	359
58	336
59	359
119	609
59	359
122	399

1. **Contract: MISTAKE: EQUITABLE RELIEF.** If, after making an agreement, in the process of reducing such agreement to a written form, the writing, by means of a mistake of the law, or rather a mistake as to the legal effect of the language used, fails to express the contract which the parties actually entered into, equity will interfere to reform it or prevent its enforcement, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact, following *Nowlan v. Pyne*, 47 Iowa, 293; and *Stafford v. Fettlers*, 55 Iowa, 484; and distinguishing *Moorman v. Collier*, 32 Iowa, 138; *Glenn v. Statler*, 42 Iowa, 107, and *Gerald v. Elley*, 45 Iowa, 322.
2. _____: _____: _____: RULE APPLIED. In this case plaintiff leased certain buildings to defendant with the mutual understanding that, in case the buildings were destroyed, defendant should be released from further liability for rent, and they were advised that the language used in the written lease properly expressed their agreement, which, as a matter of law, it did not. The buildings were destroyed by a tornado, and plaintiff's assignee sued for the rent accruing after such destruction: *Held* that the written lease did not express the contract of the parties and that plaintiff could not recover.

Appeal from Des Moines District Court.

THURSDAY, SEPTEMBER 21.

ACTION on a written lease to recover amount claimed to be due. One Ronaldson, was the lessor, and he assigned the lease to the plaintiff.

The defendant pleaded an equitable defense and alleged the agreement was, in case the buildings were destroyed, the lease should terminate and he be released from the payment of rent, and that, in reducing the contract to writing, such provision was by mistake omitted, and he asked that it be reformed so as to express the true contract. Trial to the court, judgment for the plaintiff, and defendant appeals.

John C. Power, for appellant.

Kelley & Cooper and *Overton & Marble*, for appellee.

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SEEVERS, CH. J.—The lease was executed in April, 1874, and was for the period of three years. It will be conceded the defendant agreed to pay a named sum per annum for the use of the premises. The buildings leased were destroyed by a tornado before the expiration of the lease.

The evidence, without contradiction, shows, that "in case the premises were destroyed by fire or otherwise, the lease should be terminated and Root released from payment of rent." After the lease was written, but before it was executed, the lessor and lessee asked a party as to the meaning of the lease as written, and the defendant desired to know whether the language employed would release him from the payment of rent if the buildings were destroyed. The opinion was expressed by the party asked that such would be the case, whereupon the lessor said "it was his express understanding that the term 'unavoidable accident' covered all loss by fire or otherwise, and such accident would terminate the lease." The defendant replied, if that was "his understanding and agreement he was satisfied." Such being the uncontradicted evidence, the court must have found as a matter of law that the lease, under the circumstances above stated, could not be reformed, and the single question to be determined is whether the court erred.

There is no doubt as to what the contract in fact was, and it is equally clear the writing does not express such contract. The former preceded the latter. The writing, therefore, is merely evidence of what the contract was. The rule undoubtedly is where the parties, in the absence of fraud, mistake, or other equitable circumstances, have made an agreement and the writing expresses such agreement as it was understood and designed to be made, that parol evidence cannot be introduced for the purpose of varying the contract as expressed in the writing. "But if, after making an agreement, in the process of reducing such agreement to a written form, the writing, by means of a mistake of the law, fails to express the contract which the parties actually entered into, equity

Reed v. Root.

will interfere to reform it or prevent its enforcement, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made, but the mistake of the law prevents the real contract from being embodied in the written instrument." Pomeroy on Contracts, §§ 234, 237 and authorities cited in notes. *Nowlin v. Pyne*, 47 Iowa, 293; *Stafford v. Fetter*, 55 Id., 484.

The action in *Moorman & Green v. Collier et al.*, 32 Iowa, 138, was at law and no equitable defense was pleaded. In *Glenn & Pryce v. Statler*, 42 Iowa, 107, the bond was the contract, or if this be not so, there was a conflict in the evidence as to the character of the bond that was to be prepared and executed, and in *Gerald v. Elley*, 45 Iowa, 322, there was no contract that the incumbrances should be exempted from the operations of the deed.

For the reasons thus briefly stated the cases cited are distinguishable from the one before the court. Upon equitable principles it would seem that no contract to which the parties did not understandingly assent should be enforced.

It is true, in the case before the court, the parties did assent to and execute the lease, but it does not express the contract actually made. This occurred because of a mistake in relation to the meaning the law attaches to the words embodied in the writing. The legal import of the contract in fact entered into was understood. In this respect there was no mistake. Had there been, this would have been a mistake of law which equity cannot relieve. The mistake was in knowing the meaning which the law attaches to the words employed. To our minds this can hardly be said to be a mistake of law, because the parties failed to use the words intended. It is their intention upon which the rule that relief can be had in equity is based. Now in the case before us the parties never intended to enter into the contract set forth in the writing. The mistake was one of fact in failing to use apt words to ex-

The State v. Quinton.

press their intent. The apparent conflict in the adjudicated cases is largely caused by the difficulty in ascertaining from the evidence what was the real intent. That is, whether the import of the contract had been reduced to writing. This it is the province of equity to ascertain. In the case before the court we do not think the lease expresses the intention and contract of the parties. It therefore follows that the court erred in refusing to grant the relief asked of the defendant.

REVERSED.

THE STATE v. QUINTON.

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122 122

1. **Bastardy: VERDICT: EVIDENCE TO SUPPORT** This court cannot say that the court below erred in refusing to set aside the verdict of a jury in a bastardy case, where a similar verdict had been found on a former trial, and where nothing appears to indicate that the jury was influenced by passion or prejudice, notwithstanding the preponderance of the evidence may have been in favor of the defendant.
2. ——: JURY: MISCONDUCT OF: EVIDENCE OF. An affidavit of an attorney in a bastardy case to the effect that certain members of the jury told him that, in arriving at their verdict, they considered the resemblance between the child, which was in court but not in evidence, and the defendant, is hearsay evidence, and is not to be considered.

Appeal from Lee District Court.

THURSDAY, SEPTEMBER 21.

THIS action was brought upon the complaint of one Christina Halbasch to charge the defendant as the father of a bastard child. There was a trial to a jury, and verdict and judgment were rendered against the defendant, who now appeals to this court.

Casey & Casey, for appellant.

Smith McPherson, Attorney-general, for the State.

The State v. Quinton.

ADAMS, J.—I. The defendant assigns as error that the verdict is not supported by the evidence. But the complainant testifies positively that the defendant was the father of the child. And while several facts were shown tending greatly to impair the complainant's credibility, and while the defendant testifies positively that he was not the father of the child, and never had sexual intercourse with the complainant, we see very little, if anything, to indicate that the jury was influenced by passion or prejudice. It may be that there was a preponderance of evidence in favor of the defendant. The court below, it appears, in passing upon the motion for a new trial, stated that such was his opinion. But it appears that he did not regard the preponderance such as to justify him in setting aside the verdict, and especially as there had been a former trial resulting in a verdict of the same kind. We cannot say that the court erred.

II. The defendant alleges that the jury was guilty of misconduct in that they allowed their verdict to be determined by a supposed resemblance between the child and the defendant, when the child was not introduced in evidence, but was merely casually seen by the jurors, or some of them, while sitting in the court room. The motion for a new trial was based in part upon this ground, and supported by an affidavit of D. N. Sprague who, it appears, was one of the attorneys engaged in the trial of the case.

The affidavit was to the effect that he was told by several of the jurors that the subject of the child's resemblance to the defendant was discussed by the jury, and that some of them thought it was such as to justify a finding against the defendant.

Whether this misconduct, if properly shown, was such as to justify us in setting aside the verdict, we need not determine. The only evidence before us is as to what some of the jurors told Sprague. The evidence, we think, comes under the objection of being hearsay evidence, and is not entitled to be considered. We think that the judgment must be

AFFIRMED.

Lowe Bros. & Co. v. Young.

LOWE BROS. & CO. V. YOUNG.

1. **Evidence: RECEIPT: EXPLAINED BY PAROL.** A writing which is both a receipt and a contract may, so far as it is a receipt, be explained by parol testimony.
2. **Practice: EXAMINATION OF WITNESSES: DISCRETION OF COURT.** The latitude to be allowed in the examination of witnesses depends largely on the circumstances of the case and rests, to some extent at least, in the discretion of the court. In this case, where the witness introduced by plaintiff indicated a strong purpose to sustain the validity of the transaction on which plaintiff relied, *held* no error to allow great latitude in cross-examination.
3. **Contract: ILLEGAL CONSIDERATION: GAMBLING ON BOARD OF TRADE.** The court instructed the jury in substance that the plaintiffs could not establish title to the corn in suit through the receipts in question, if they were issued to pay losses which the maker of the receipts might suffer in the purchase and sale of commodities, wherein it was not the purpose, intention or expectation of either of the parties that such purchases or sales should be actually consummated by delivery or receipt of the thing purchased or sold, but, on the contrary, it was the purpose of all the parties that the same should be settled by the payment of the difference between the purchase or selling price and the market price at the time of settlement, and that the receipts, if so issued, were void; *held*, correct, and in accord with *Pixley v. Boynton*, 79 Ill., 351.
4. **Evidence: INTENTION PROVED BY CONDUCT.** Where the question was whether or not certain transactions between the parties were intended by them to be in the nature of gambling: *held*, that the jury was authorized to find the *intention* of the parties by the course of dealing between them.

Appeal from Benton District Court.

FRIDAY, SEPTEMBER 22.

THE plaintiffs bring this action for the alleged conversion by the defendant of nearly thirteen thousand bushels of corn, which the plaintiffs claim they purchased from one J. C. Pike. The plaintiffs base their title to the grain upon certain receipts which are claimed to be warehouse receipts. The defendant denies generally the allegations of the petition and alleges that the grain in question was purchased in his name, with money furnished by him to Pike. The answer

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further alleges, among other things, that the question were made by Pike to the plaintiff mutual understanding and purpose that and evidence a mere lien upon the corn to issory notes for \$1,000 each, made content the instruments, and that the notes and the them were given for loans already made, and that should thereafter be sustained by Pike's gambling transactions in various commodities, iffs had carried on, and were to carry on, for the city of Chicago. The jury returned a general verdict for the plaintiff, and also found specially that upon the board of trade of Chicago, by Plaintiff Pike, were gambling transactions. The motion was overruled, and judgment was rendered for costs. The plaintiff's appeal.

Nicholls & Burnham, for appellants.

Gilchrist & Haines, for appellee.

DAY, J.—I. The plaintiffs claim the question under four papers claimed to be valid. Two of these papers are as follows:

"VINTON, IOWA,

"I have this day received and agree to
as the agent of Lowe Bros. & Co., of Ch^t
thousand bushels of No. 2 corn, which is
on lot number 2, the cribs being marked
Co., and to be shipped to them or their order
1880. And I agree to keep said cribs in
to notify Lowe Bros. & Co., immediately
or interference with said corn. For all
have received full compensation.

The other two papers are identical with
that they are dated July 2, 1880, and spe-
shall be shipped during the month of Au-
iffs introduced J. C. Pike and proved by

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of the instruments are not in his handwriting, but that the signatures are his. The instruments were then read in evidence. The plaintiffs then recalled Pike, who testified in substance that he owned the cribs in which the corn was stored, and the premises upon which they were situated; that there were about 20,000 bushels of corn in the cribs when the April receipts were executed, and the same quantity when the July receipts were executed; that he shipped about 7,000 or 8,000 bushels to plaintiffs, and left the balance in the possession of one Westcutt, with the directions to shell and ship to the plaintiffs.

Upon cross examination Pike stated, without objection, that at the time he executed the receipts he was the owner of the corn; that he was owing Lowe Bros. & Co. some, and wanted some money, and he asked them by letter if they could use those receipts, and they replied they could, and they were executed and delivered to them. He was then asked to state all about the circumstances under which the receipts and notes were executed. This question was objected to as not being cross-examination, and as incompetent, the receipts being the best evidence. The objection was overruled, and the witness in answer to this and other questions, also objected to, testified substantially as follows: "I think that when I spoke to Lowe Bros. & Co. about these receipts, and asked them if they could use them, they said they could, and the receipts were signed and delivered. There was no particular arrangement about the price of the corn, only as it was computed by the amount of money and the amount of corn. I sent some of the corn to Lowe Bros. & Co. that was in the cribs at the time I executed the receipts to them, and they sent me returns for it, and gave me credit for it. They never actually paid me any money on this corn that I remember. I was indebted to them at that time. I can't remember how much. They never demanded security of me before that time, and don't know that they desired it. The way they came to send me the receipts was that I asked them if they could use the receipts for what I was indebted to them,

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and I wanted some money. The notes were given for money and indebtedness. The indebtedness receipts were given was for losses made in connection with grain in Chicago. The notes, together with crib receipts, which purport to have been given to secure the plaintiffs for moneys that they should advance for grain deals in Chicago. The indebtedness was made to be, on the face of them, sales and purchases of various commodities on the board of trade. In the contracts, which purport to have been made, the grain bought or sold for future delivery. When I say none of the property sold was ever offered or delivered, I know of." The plaintiffs objected to all of the evidence on the ground above stated.

1. The plaintiffs evidently introduced the evidence for the purpose of establishing the allegations in the

plaintiffs' case, that they owned the corn in question.

1. **EVIDENCE:** The receipt: explained by the plaintiff. Whether or not it depends upon the parol.

The transactions evidenced in part by the

It is clear that the transactions may have been entered into with such circumstances as to render them inadmissible. The receipts merely indicate that Pike held the amount referred to, as the agent of the plaintiffs, and accounted to them. The receipts do not disclose the circumstances in which the grain was received. It is proper to inquire into the circumstances in order to determine the true nature of the transaction. A receipt is always susceptible of being forged.

In so far as the receipt partakes of the nature of a bill of lading, the evidence offered does not contradict it. The testimony introduced violates no rule of evidence. It was therefore competent.

2. It depends largely upon the circumstances in which the receipt was given and rested, to some extent, at least, in the discretion of the court.

2. **PRACTICE:** The examination of witnesses: whether it was proper to allow the cross-examination of the court. The plaintiffs complain that the testimony of the

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from Pike upon cross-examination and in answer to leading questions. But Pike was introduced as a witness by the plaintiffs. They had conducted a number of transactions for him, as members of the board of trade of Chicago, and his testimony taken all together indicates a strong purpose to sustain the validity of the transaction with them which is now in question. Under such circumstances the court may properly allow great latitude in examination. Under the circumstances we think the court did not commit any substantial error in allowing this testimony to be introduced by way of cross-examination.

II. Appellants assign as error the giving of the following instructions:

"9. Hence if you believe from evidence that J. C. Pike, for the purpose of raising in advance, by way of credit with

3. CONTRACT: illegal consideration : gambling on board of trade. plaintiffs, money with which to pay losses said Pike might in the future suffer in the purchase and sale of grain and other commodities, made with or through plaintiffs, wherein it was not the

purpose, intention or expectation of either of the parties to such purchase or sale that such purchases or sales should be actually carried out or consummated by actual delivery or receipt of the thing purchased or sold; but, on the contrary, if it was the purpose of all the parties thereto that the same should and would be settled and adjusted by the payment of the difference between the purchase or selling price and the market price at the time of settlement, executed and delivered said written instruments in evidence, and dated respectively April 26, 1880, and July 2, 1880, then you are instructed that, though said money so raised by said Pike was by plaintiffs actually used in settling and adjusting or closing out such purchases and sales, said instruments are void, and plaintiffs cannot, through them, establish title to corn therein mentioned, and cannot recover in this action, and your verdict will be for defendant.

"10. On this subject you are further instructed that, as a

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question of fact, you will determine whether the parties to said contract for the purchase or sale of the various commodities, if such contracts were made, really meant and intended to purchase, receive and pay for, or sell, deliver and collect, the price of the very commodities purporting to have been bought and sold. If they did not, every such contract was a gambling transaction and void, and no rights can be founded thereon."

Counsel for appellants construe this instruction to mean that if any of the parties acted in bad faith the transaction is invalid, and insists that the jury should have been instructed that if Lowe Bros. & Co. acted in good faith, the transaction as to them was not a gambling transaction. The instructions, taken together, are not fairly susceptible of the construction placed upon them by appellants' counsel. The ninth instruction clearly directs the jury that the plaintiffs cannot establish title to the corn in suit, through the instruments in question, if they were issued to pay losses which Pike might suffer in the purchase and sale of commodities, wherein it was not the purpose, intention or expectation of *either* of the parties that such purchases or sales should be actually consummated by delivery or receipt of the thing purchased or sold, but, on the contrary, it was the purpose of *all* the parties that the same would be settled by the payment of the difference between the purchase or selling price and the market price at the time of settlement. This instruction is fully in accord with the doctrine announced in *Pixley v. Boynton*, 79 Ills., 351, cited and relied upon by the appellants.

The tenth instruction must be considered in connection with the ninth, and when so considered, the doctrine which it announces is not objectionable.

III. Appellants assign as error the giving of the following instruction:

"But if you believe from the evidence that said Pike was a warehouseman, wharfinger, or engaged in storing property for others, and if you believe that the corn in controversy

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was at the date of said instrument in Pike's possession, and owned by him and stored in his cribs, and if you further believe that the said Pike issued and executed to plaintiffs said instruments or receipts as security for loans and advances of money then or theretofore made or to be made by plaintiffs to said Pike, then in law such instruments are not warehouse receipts in the specific and appropriate sense of the term, but the transaction is one of giving a lien in the nature of a chattel mortgage, and in order that it may be valid as such, there must not only be a legal consideration, but the corn upon which the lien purports to be given must be separate and identified, and if you find that such receipts were given as a lien only, and that the amounts of corn therein described were not set apart from all similar property in bulk or mass, with which it was mixed, if that be found by you, then no title to the designated number of bushels passed as security for the advances made or to be made, and no lien was created."

Appellants claim that the written instruments involved in this case are either warehouse receipts in the appropriate sense of the term or else they are of no validity whatever. In support of this position appellants cite and rely upon the case of *Sexton & Abbot v. Graham*, 53 Iowa, 181 (195). We do not deem it necessary to the disposition of this case to determine the question raised upon this instruction. The jury found specially that the transactions upon the board of trade of Chicago, by plaintiffs, for J. C. Pike, were gambling transactions. The transfer of the grain to plaintiffs, whether in payment of, or as security for, a liability growing out of a gambling transaction was invalid and without consideration, and it becomes immaterial to inquire whether a mere lien could be created by the instruments in question. See *Pickering v. Crose*, 79 Ill., 328; *Gregory v. Wendell*, 39 Mich., 337; *Rumely v. Berry*, 63 Me., 570; *Brua's Appeal*, 55 Pa. St., 294; *Barnard v. Buckhans*, 9 N. W. Rep., 595; *Kirkpatrick v. Bonsall*, 72 Pa. St., 155; *In re John Green*, 7 Bissell, 338.

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IV. It is claimed that the finding of the jury that the transaction on the board of trade of Chicago by plaintiffs 4. **EVIDENCE:** for J. C. Pike were gambling transactions, is altogether without support in the evidence. The intention proved by conduct. question was submitted to the jury under proper instructions. It appears quite clearly from the testimony that Pike neither expected to deliver nor receive the commodities sold or purchased, but that he simply expected to receive or pay the differences in price, upon final settlement. There is no direct testimony that the plaintiffs had the same intention. It does appear, however, that settlements were usually, if not always, made either by paying or receiving the differences in price. The articles sold or purchased were not in fact delivered. The jury was authorized to find the intention of the plaintiffs by the course of dealing between the parties. The verdict in our opinion cannot be disturbed as unsupported by the testimony.

AFFIRMED.

RAYMOND V. MORRISON ET AL.

1. **Judgment: IN BANKRUPTCY: NOT COLLATERALLY ATTACKED.** The appointment of one as provisional assignee of a bankrupt by a court having jurisdiction, though irregular and erroneous, is not void, and cannot be attacked in a collateral proceeding.
2. **Conveyance: QUITCLAIM DEED: RIGHTS OF GRANTEE.** A grantee who takes real estate by a quitclaim deed only cannot be regarded as a good faith purchaser, and is not entitled to protection as against prior equities of which he had no notice, but one who takes from such grantee by a warranty deed, in good faith and without notice of such equities, will be protected.
3. **Evidence: FRAUD: BURDEN OF PROOF.** The burden of proof to show bad faith is on him who alleges it, and *held* that the evidence in this case was not sufficient to establish bad faith on the part of plaintiff's assignee. His conduct was consistent with an honest purpose and a dishonest purpose should not be presumed.
4. **—: OF ADVERSE POSSESSION: PAYMENT OF TAXES NOT.** The payment of taxes on a tract of land is not evidence of the adverse possession of it.

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Appeal from Poweshiek District Court.

FRIDAY, SEPTEMBER 22.

ACTION to foreclose a mortgage, judgment for the plaintiff, and defendant and intervenor appeals.

Clark & Cheshire, for intervenor.

Redman, Carr & Farmer and *Ballard & Robinson*, for appellant.

Clark Varnum, for appellee.

SEEVERS, CH. J.—The pleadings are quite lengthy but the facts upon which the case must be determined may be briefly stated.

In 1855, W. W. Wellington was the owner of the mortgaged premises and in that year, as is claimed, he conveyed the same to Hugh D. Downey. This deed was not filed for record until 1878. In 1855, Downey conveyed to W. E. Spencer, such conveyance having been filed for record in 1856. In 1877, Spencer was adjudged a bankrupt and the intervenor, Pierce, appointed "provisional assignee of the estate and effects of said Spencer, with full power and authority to take possession of, manage and control the same."

The defendant, Morrison, paid the taxes on the real estate for the year 1876, and with this exception Spencer paid the taxes from the time Downey conveyed to him until 1878, when the taxes were paid by the plaintiff. In 1876, Wellington conveyed the premises by quitclaim deed to the defendant, Clark Varnum, and he within ten days thereafter conveyed by warranty deed to one Hastings, and the latter to the defendant, Morrison, by whom the mortgage sought to be foreclosed was executed. The mortgage and conveyances last named were all filed for record in June, 1876. At the time Wellington conveyed to Varnum there was no one in possession claiming title. Hastings sold and assigned the

SEPTEMBER TERM, 1882.

Raymond v. Morrison.

mortgage to Varnum and the latter to the plaintiff defendant, Morrison, resists the payment of the money on the ground that he did not obtain any title to the property and the intervenor insists that he, as assignee in law of Spencer, is the owner thereof, and in substance his title be established.

I. The plaintiff insists, for several reasons, that he should not be heard *de novo* in this court. We do not

1. JUDGMENT necessary to determine such question.
in bank-
ruptcy: not iff also insists, and the court below
collaterally attacked. decreed, that the intervenor, Pierce, as assignee, did not have the right to commence or prosecute his cross action, and the same was dismissed. we think the court erred. The bankrupt court had jurisdiction and power to make an order concerning the estate. The order cannot be said to be void because it was designated as provisional assignee. Full power and authority was given him to control the property of the bankrupt. This could not be done in this case in any way other than was done. The appointment of Pierce may have been irregular and erroneous, but it was not void, because the court was vested with full jurisdiction to make it. Therefore, cannot be attacked and set aside in this proceeding.

II. It is urged with great force that Varnum has sufficient knowledge to put him on inquiry as to the

2. CONVEY- from Wellingham to Downey. We
ANCE: quit- claim deed: think this is so, but it is really immaterial
rights of grantee. he had or not, because Varnum is not entitled to protection for the reason that he held under a quitclaim deed only and cannot be regarded as a good faith purchaser. The material question is as to the rights of Hastings, the plaintiff and defendant. Varnum conveyed to Hastings by quitclaim deed. The latter, therefore, is entitled to protect a good faith purchaser without notice of the equities of the intervenor or Spencer. It is insisted that Hastings

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cient knowledge to put him on inquiry, but we are unable to so find. Varnum and Hastings had known each other for some years. The relation of attorney and client had existed, and perhaps continued to exist, between them.

The purchase by Hastings was made within a few days after the conveyance was made from Wellingham to Varnum.

3. EVIDENCE: The price paid was \$425, and very shortly there-
fraud: bur-
den of proof. after, Hastings sold to the defendant for \$1,000,
and without recourse on him, sold and assigned the notes for
the unpaid purchase-money amounting to \$800 to Varnum.
The notes were payable in two, three and four years after
date with ten per cent per annum. Varnum paid Hastings
for the notes \$525. The foregoing are the material circum-
stances tending to show a fraudulent combination between
Varnum and Hastings; opposed to which is their positive
evidence that there was no division of profits, and that the
transaction in all respects was honest and *bona fide*. The
question is whether Hastings, prior to the purchase, had suffi-
cient knowledge of the unrecorded deed from Wellingham to
Downey to put him on inquiry. He testifies he did not have
any knowledge of such deed. There is no evidence tending
to show he had, unless the circumstances above stated have
that effect. Up to, and preceding the purchase, there was
nothing in the conduct of Hastings which in any just sense
can be regarded as suspicious. His conduct was consistent
with an honest purpose. This being so, a dishonest purpose
should not be presumed. The fact that Hastings purchased
the land for \$425 cash, and within a few days thereafter sold
for \$1,000, mostly on time, cannot be sufficient to charge him
with notice that either his or Varnum's title was bad. His
intimacy with Varnum does not have much significance. The
conduct of Hastings after his purchase is wholly immaterial,
except as it may tend to show bad faith in making the pur-
chase and to discredit his positive evidence as to his good
faith. At most, the conduct of Hastings may be said to be
suspicious, but we cannot say it is sufficient to discredit his

Raymond v. Morrison.

positive evidence of good faith. The transaction on his part was honest, or he has been guilty of willful and deliberate perjury. The burden to show bad faith on the part of Hastings was on the appellants, and we think they have failed to establish such fact.

III. Having found that Hastings is entitled to protection, it follows, we incline to think, that the plaintiff and defendant ~~are entitled thereto. But, if this be not so, there of adverse possession; is no sufficient evidence either of them had knowledge of the equities of Spencer. To our minds there is no evidence which in any just sense can be said to tend to so prove as to the plaintiff. As to the defendant, the only fact of significance is that he had been informed before his purchase that Spencer had paid the taxes on the land. But he was assured by Hastings that the title was good, and the payment of taxes, at most, is evidence of a claim of title. As there was no one in possession, we do not think the mere payment of taxes was sufficient to put him on inquiry. It has been held the payment of taxes is not evidence of adverse possession. *S. C. & I. F. Town Lot Co. v. Wilson et al.*, 50 Iowa, 422. The judgment of the court foreclosing the mortgage must be affirmed, but so much thereof as dismissed the cross petition of Pierce must be modified and a decree entered quieting the title to the real estate in the defendant. Such a decree, if desired, may be entered in this court.~~

MODIFIED AND AFFIRMED.

Wells v. Stomback.

59 376
132 540

WELLS, CLERK OF WASHINGTON TOWNSHIP, v. STOMBACK ET AL

1. **Township: CANNOT SUE.** A township has no legal capacity to sue;— following *Township of West Bend v. Munch*, 52 Iowa, 132.
2. **Practice: SUBSTITUTION OF PARTY PLAINTIFF.** When an action was brought in the name of the township as plaintiff and the defendant appeared and demurred on the ground that the township had no legal capacity to sue and the demurrer was sustained, *held* that it was not error, under section 2689 of the Code, to allow the clerk of the township to be substituted as party plaintiff by amendment to the original petition.
3. **Township Clerk: RIGHT TO SUE ON ROAD SUPERVISOR'S BOND.** The township clerk being entitled to the possession of the money belonging to the general township fund (section 981 of the Code), he has the right to maintain an action for the recovery of such money on the bond of a road supervisor.
4. **Road Supervisor: MISAPPROPRIATION OF TOWNSHIP FUND BY: LIABILITY ON BOND.** Where the township trustees had set apart as a general township fund one half of the taxes levied (Code, §§ 969, 970), which fund it was the duty of the road supervisor to collect and pay over to the township clerk (Code, § 981), but which he in fact expended for bridge materials, *held* a misappropriation of the money for which he was liable on his official bond.

Appeal from Jasper Circuit Court.

FRIDAY, SEPTEMBER 22.

THE defendant Stomback was elected road supervisor of district No. 10 in Washington township, and gave a bond for the faithful performance of the duties of his office. This action was brought on such bond. The cause was referred and a finding of facts made by the referee, on which judgment was rendered for the plaintiff and defendants appeal.

Winslow & Wilson, for appellant.

Clausen Clark, for appellee.

SEEVERS, CH. J.—I. The amount in controversy being less than one hundred dollars certain questions have been

Wells v. Stomback.

certified as to which it is said to be desirable to have the opinion of the Supreme Court. The original petition was entitled "Washington Township by W. B. Wells, township clerk, Kennedy, Lore, and Kingdon, township trustees," as plaintiff, and stating the cause of action upon which judgment was afterwards rendered. A demurrer to the petition was sustained on the ground plaintiff had no legal capacity to sue. Whereupon an amendment to the petition was filed by the plaintiff in which he claimed the right to recover on the cause of action stated in the original petition. This amendment the defendants moved to strike out of the record, but the motion was overruled and the defendants answered. We are asked "whether the plaintiff having commenced the suit in the name of Washington Township could amend the petition making the clerk plaintiff." In the *Township of West Bend v. Munch et al.*, 52 Iowa, 132, it is held a township did not have the legal capacity to sue. This being so it is claimed there was no plaintiff named in the original petition and, therefore, none could be substituted; that an amended petition could not be filed because there was nothing to amend. But we think when there is an appearance to the action and the defendant tests the right of the named plaintiff to maintain the action by a demurrer and the latter is sustained the name of the proper

parties plaintiff may be substituted in the action, ^{2. PRACTICE:} substitution of by an amended petition, subject of course to an party plaintiff. apportionment of the costs and the right of the defendants to a continuance if taken by surprise. If this is not the rule the action must abate and another be brought. This, under the statute, should not be the rule unless substantial justice so demands. The statute in terms provides the court in furtherance of justice may permit a party to amend any pleading "by adding or striking out the name of a party * * * or by inserting other allegations material to the case, or, when the amendment does not charge substantially the claim or defense, by conforming the pleadings or proceedings to the facts proved." Code, § 2689. The de-

Wells v. Stomback.

fendants could make their defense in this action as well as in a new one and they could not have been prejudicially affected by the amendment. The right to make it we think existed. The question must be answered in the affirmative.

II. We are asked whether the plaintiff can maintain this action. The bond was in the ordinary form executed by all ^{3. TOWNSHIP} county officers. On such a bond suit may be ^{clerk : right} ^{to sue on road} maintained by any party intended to be secured ^{supervisors} ^{bond.} thereby. Code, §§ 2552, 3368. If the plaintiff in his official capacity was entitled to the possession of the money sued for, then he is a person intended to be secured by the bond. The money sought to be recovered is what is designated the general township fund as defined in Code, §§ 969, 970. The township clerk is entitled to the possession of such fund. Code, § 981. The plaintiff, therefore, is entitled to maintain this action. *Long, Township Clerk, v. Emsley et al.*, 57 Iowa, 11. The question under consideration must be answered in the affirmative.

III. The referee found the defendant Stomback collected and expended for necessary bridge material in his district all ^{4. ROAD super-} ^{visor: misap-} ^{propriation of} ^{township fund} ^{by: liability} ^{on bond.} the general township fund collected by him, except a few cents, and that there was due him more money than was in his hands. We are asked whether, under the circumstances, the plaintiff can recover. The township trustees determine the amount of property tax which shall be levied. Code, § 969. It is their duty to set apart such portion of said tax as they may deem necessary as a general township fund, which is to be expended for certain specified purposes. Code, § 970. They did set apart one half of said tax as such fund. This it was the duty of Stomback to collect and pay over to the township clerk. Code, § 981. Such being the duty of Stomback, any other disposition of the money was a misappropriation for which he is liable on his official bond. The question under consideration must be answered in the affirmative. The remaining question is not argued by counsel.

AFFIRMED.

SEPTEMBER TERM, 1882.

Sleeper v. Iselin & Co.

SLEEPER ET AL. V. ISELIN & CO. ET AL.

1. **Receiver: APPOINTMENT OF: EVIDENCE CONSIDERED APPLIED.** Upon consideration of the evidence in this case it appears that defendants were not entitled to have a receiver appointed, as they did not show that the property in controversy, or its profits, was "in danger of being lost or materially injured" as required by section 2908 of the Code.

Appeal from O'Brien Circuit Court

FRIDAY, SEPTEMBER 22.

THE action was brought to foreclose a deed of trust covering a certain grist mill and other property. The defendants admitted the execution of the deed of trust, and that the amount is due thereon, which amount, however, is much less than the amount claimed by the plaintiffs. In connection with their answer they filed a cross-petition in which they averred, among other things, that the said A. W. Sleeper, trustee in the deed of trust, had taken possession of the property as trustee for the plaintiffs. The property was not properly cared for, nor used in a proper manner, and had deteriorated, and was continuing to do so. They asked that the said A. W. Sleeper be held to account, and that pending the settlement a receiver be appointed to take charge of the mill property and other property in his possession. The plaintiffs for answer to the cross-petition denied all the allegations thereof, excepting the want of care, and the improper use and deterioration of the mill property. In addition to such denials they averred that they had become the owners of the property at an execution sale made upon a judgment in favor of O. A. Pray & Co. The case coming on for hearing on the defendants' application for a receiver, the application was granted and a receiver was appointed. From the time of appointing a receiver of the mill property the plain-

Sleeper v. Iselin & Co.

Barret & Bullis, for appellants.

J. H. Swan, for appellees.

ADAMS, J.—The statute provides for the appointment of a receiver upon the petition of either party to a civil action wherein he shows a probable right to or interest in any property which is the subject of the controversy, and that such property or its rents and profits are in danger of being lost or materially injured or impaired. Code, § 2903. If the defendants who are applicants for a receiver in this case have shown themselves to be within the provisions of the statute, they are entitled to a receiver.

The first question naturally presented is as to whether they have an interest in the property, or whether as the plaintiffs contend their interest was extinguished by the sale on the O. A. Pray & Co. judgment. But we do not propose to go into this inquiry. The question raised is not free from difficulty. For the purposes of the opinion it may be conceded that the defendant's interest in the property has not been extinguished. We come, then, to inquire whether the property or its rents and profits were in danger of being lost or materially injured or impaired.

The plaintiffs, through their trustees, had taken possession of the mill and leased it, and were receiving the rents and profits under a claim of right to the same. This would not be their right as mere creditors secured by a deed of trust upon the mill; but they claim that by another instrument they acquired a lien upon the rents as security for the same indebtedness. It appears that after the execution of the deed of trust the defendants, Iselin & Co., for the purpose of further securing the same indebtedness, executed a mortgage covering a large amount of personal property, among which is specified "all accounts now due, or to become due, from any building owned by them or any of them, and all accounts now due or to become due in the milling business."

Sleeper v. Iselin & Co.

The plaintiffs insist that the expression "all accounts now due or to become due from any building" means, all accounts now due or to become due *for rents* from any building, and we have to say that in this it appears to us that they are correct. It is not provided that the plaintiffs or their trustee should have the right to lease the mill, but it is shown that Iselin & Co. had allowed the mill to become idle, and that the same was deteriorating by reason of the fact that it was idle. As the plaintiffs were not only entitled to the rents of any building, but were entitled to the income of the milling business, it appears to us that having found the mill idle, and having taken possession thereof and leased it for the better preservation and productiveness of the same, Iselin & Co. cannot justly complain of the mere fact that the plaintiffs are in the receipt of the rents; nor, indeed, do we understand that such is their complaint. What they complain of is the want of care and preservation of the mill. We have to inquire, then, whether their allegations in this respect are sustained. The evidence in their behalf consists merely of their sworn cross-petition. This is not only denied by the plaintiffs in a sworn answer, but it is shown by the affidavits of two experienced millers, now the lessees of the mill, and who have had a long acquaintance with it, that it is managed with prudence and care, and is suffering the least possible injury, and is in a better condition than they have ever known it before. We think that the allegations of the defendants, Iselin & Co., that the mill is deteriorating for the want of proper management and care are not sustained, and it follows that their application for the appointment of a receiver should, so far as the mill is concerned, have been denied.

REVERSED.

State v. Buck.

59 888
108 736

STATE V. BUCK ET AL.

1. **Indictment: Duplicity cured.** Defendant was charged in the same indictment with two distinct offenses, but before any evidence was introduced, the district attorney dismissed as to the count charging one of the offenses, and the defendant pleaded guilty as to the other; *held*, that the duplicity was cured and that the defendant was properly convicted.
2. **Practice in Supreme Court: Reduction of sentence.** This court will not interfere with the discretion of the District Court in imposing a sentence when all the evidence which was before that court is not before this.
3. **Criminal Law: Withdrawing Plea of Guilty after Sentence.** After sentence, the defendant moved for leave to withdraw the plea of guilty and for a new trial, on the ground that he was surprised by the magnitude of the sentence; *held* that, under the circumstances of this case (see opinion), the court properly overruled the motion.

Appeal from Floyd Circuit Court.

FRIDAY, SEPTEMBER 22.

INDICTMENT for forging a promissory note for the amount of \$100. To the indictment the defendant, Henry, pleaded guilty, and from the judgment rendered thereon appeals.

J. S. Root, for appellant.

Smith McPherson, Attorney-general, for the State.

SEEVERS, CH. J.—I. There were two counts in the indictment, one for forging a promissory note and the other for 1. INDICTMENT: duplicity cured. uttering the same note. No objection was made to the indictment in the District Court, and the defendant, Henry, in the first instance pleaded not guilty. A jury was impaneled to try such issue, but before the introduction of any evidence the district attorney dismissed the count for uttering, and thereupon the defendant, Henry, pleaded guilty to the court for forgery. It is now urged no legal conviction can be sustained on the indictment because

State v. Beck.

two distinct offenses were charged therein. It was held in *The State of Iowa v. McCormack*, 56 Iowa, 585, that when proper objection was made to such an indictment before trial it was error to overrule it, because such an indictment was bad for duplicity. We think the dismissal of one count in the indictment before the introduction of any evidence and a plea of guilty as to the remaining count cures the defect that originally existed. The defendant was in no manner prejudiced by the mere finding of the indictment. After dismissal the indictment in legal effect was the same as if it had been found for the forgery alone, and is therefore clearly sufficient to sustain the judgment.

II. There were two indictments found against the defendant for forging and uttering two promissory notes. On one the defendant, Henry, had been tried and a verdict of guilty rendered at the time he pleaded guilty on the present indictment. On the first indictment the defendant was sentenced to be imprisoned in the penitentiary for six years and for a like period in the present case, the latter to commence on the expiration of the former. It is said this punishment is excessive and we are asked to reduce it. None of the evidence attached to the indictment in the present case is before us. The evidence introduced on the trial in the other case is before us, but we are unable to say what were the circumstances attending the forgery in this case. We feel unwilling to interfere with the discretion of the District Court unless all the evidence which was before the court at least, is before us. No evidence was introduced in this case, but the court had before it the evidence attached to the indictment. There was a motion filed to withdraw the plea of guilty and for a new trial on the ground the defendant was surprised by the punishment inflicted, it being much greater than he expected. In support of this motion there was filed an affidavit of defendant's attorney as to an understanding he claims to have had with the trial judge as to the extent of

2. PRACTICE
in supreme
court: reduc-
tion of sen-
tence.

3. CRIMINAL
law: with-
drawing plea
of guilty.

Brumbaugh v. Zollinger.

the punishment that would be inflicted. There is also before us the statement of the judge as to the same matter. We do not deem it essential to set out at length these statements, deeming it sufficient to say that from the affidavit of the attorney alone we are not satisfied he had good grounds to believe the punishment would be less than it was, or at least there was no understanding what it would be. While it is shown the attorney was surprised at the extent of the punishment, there is no showing the defendant was, or that he pleaded guilty in this case, in reliance on what his attorney said as to the punishment that would be inflicted. We do not think under the circumstances we can interfere.)

AFFIRMED.

BRUMBAUGH ET AL. V. ZOLLINGER.

- 59 382
122 109
1. **Estoppel: JUDICIAL SALE OF HOMESTEAD.** Where on special execution the sheriff (defendant) sold a quarter-section of land belonging to plaintiffs, forty acres of which was their homestead, and, after satisfying the special execution, he in good faith, without notice, claim, objection, or direction by plaintiffs to the contrary, applied the surplus on other executions in his hands, held that by thus standing by and allowing the sheriff to so appropriate and pay over the surplus, plaintiffs must be regarded as having abandoned all claim to their homestead rights, if any they had, in the surplus, and cannot now recover such surplus from the sheriff.
 2. **Judicial Sale: PLATTING OF HOMESTEAD.** When a whole quarter-section was lawfully sold in a body, after having been offered in forty acre parcels, held that the execution defendants were not prejudiced by the failure of the sheriff to make out and plat the homestead.

Appeal from Jasper District Court.

FRIDAY, SEPTEMBER 22.

ACTION upon a sheriff's official bond to recover an amount of money collected upon an execution against plaintiffs which was in excess of the amount due thereon. The cause was

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tried to the court without a jury, and upon the facts specially found a judgment was rendered against defendant who appeals to this court.

H. S. Winslow, for appellant.

H. W. Parker, for appellee.

BECK, J.—I. The petition alleges that defendant being the sheriff of the county, upon a special execution issued on a decree of foreclosure against plaintiffs, sold a quarter-section of land owned by plaintiffs, forty acres of which were occupied by them as a homestead; that after satisfying the execution there remained in defendant's hands the sum of \$619.95 which he has failed and refused to pay plaintiffs.

The answer shows that the money remaining in the hands of the defendant, after satisfying the special execution, was applied on other executions in his hands against the plaintiff, Moses, in good faith, without notice, claim, objection or direction by plaintiffs to the contrary.

The third count of the answer shows that plaintiffs, by reason of their failure to object to the appropriation of the surplus as made by defendant, and by their failure to make a claim and to give notice thereof and to direct the defendant as to the appropriation of the surplus realized by sale of the lands, which was more than two years before the commencement of this action, have abandoned their claim thereto. Other allegations of the pleadings need not be set out.

A motion to strike the third count of the answer on the ground that it is "irrelevant and does not allege any sufficient defense to the action," was sustained.

The District Court in the findings of facts set out the special execution and the sheriff's return thereon, and the decree, wherein it appears that no direction was given in the decree touching the disposition of the surplus, nor were plaintiffs' homestead rights protected in any manner, or to any extent, by any direction in the decree or execution. The return

Brumbaugh v. Zollinger.

shows that the sheriff offered for sale, successively, each "forty" of the quarter-section, and that no bid being made upon any one of them, thereupon, he offered the whole "quarter" together, and it was sold for a sum sufficient to satisfy the execution with a surplus as above stated, which was applied upon other executions, and due return thereof was made.

The District Court found that plaintiffs resided upon the land at the time of the sale and it constituted their homestead; that no selection or plat of the homestead was made by the sheriff or plaintiffs, and that no demand was made upon the sheriff for the surplus. It is not shown that plaintiffs made any objection to the appropriation of the surplus, or gave any notice or direction in regard thereto. The defendant testifies that the plaintiffs made no request, nor any explanations, in regard to the surplus. This testimony is not contradicted.

II. We reach the conclusion upon these facts that plaintiffs by standing by and permitting the sheriff without claim, notice or demand on their part, to appropriate and pay over the surplus, must be regarded as having abandoned all claim to their homestead rights in the surplus, whatever they may be. Plaintiffs should have spoken before an appropriation had been made of the surplus. Being silent when they should have spoken, they cannot now be heard. The sheriff was authorized to conclude that as plaintiffs made no claim to, and gave no direction in regard to, the surplus, they had no right to it.

If a party so act that he induces the belief that he has abandoned his homestead, he cannot recover it from one who in good faith has purchased it in the belief so created. This rule applicable to a homestead ought to control the disposition of its proceeds.

III. The plaintiffs were not prejudiced by the failure of the sheriff to make out and plat the homestead. He lawfully sold the whole tract together, after having offered it in forty

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acres parcels. There could be no benefit to plaintiffs from the platting, as all the land was at last lawfully sold in a body.

IV. There can be no doubt of the correctness of our conclusion when other facts of the case are considered.

The plaintiffs claim to recover the surplus. The defendant shows in his answer that he had appropriated it upon other executions. This he could lawfully do unless plaintiffs are entitled to hold it under their homestead rights. The burden rested upon them to show their right to the surplus. This required them to establish that they had a homestead on the land, and that the judgments whereon the executions issued which were held by defendant, and to which he applied the surplus, did not authorize him so to do. They should have shown that these judgments were not liens upon the land; but no proof of this fact was offered. This court cannot presume that the sheriff violated the law by making the appropriation, but will presume, until the contrary be shown, that he acted rightly. The plaintiffs in this view failed to make proof of facts entitling them to the surplus.

The rulings of the court in striking out the third count of the answer, and in rendering judgment for plaintiff upon the facts of the case, are erroneous.

As the foregoing views and conclusions are decisive of the case and lead to a result which defeats the action, other questions argued by counsel need not be considered. The cause will be remanded to the court below for a judgment for defendant upon the facts found.

REVERSED.

Jordan & McCallum v. Osceola County.

69 388
79 669
59 388
131 157

JORDAN & McCALLUM v. OSCEOLA COUNTY.

1. **Contract: WITH COUNTY SUPERVISORS: PROVED BY PAROL.** It is not necessary to the validity of a contract made with the board of supervisors that it be entered on the supervisors' records, but such contract may be proved by parol:—following *Tatlock v. Louisa County*, 46 Iowa, 138.
2. **County: RIGHT TO EMPLOY COUNSEL.** A county has the undoubted right to employ counsel to prosecute or defend an action, or to perform other services.
3. **—: SUPERVISORS: MUST ACT IN SESSION.** County supervisors are not authorized to bind the county by a contract made by them individually, but they must act as a board in session in order to do so.
4. The evidence in this case held sufficient to support the verdict of the jury.

Appeal from Sioux District Court.

FRIDAY, SEPTEMBER 22.

ACTION to recover for legal services rendered by plaintiffs, who are attorneys at law. A verdict was had for plaintiffs, and a judgment was rendered thereon. Defendant appeals.

James T. Barklay and J. H. Swan, for appellants.

H. Jordan, for appellees.

BECK, J.—The questions presented in the case will be considered in the order of their discussion by defendant's counsel.

I. Evidence was admitted against defendant's objection, tending to prove the employment of plaintiffs by an oral contract made by the supervisors, no entry of which was made in the records of the board of supervisors. Defendant insists that the evidence is incompetent for the reason that all proceedings of the board are by law required to be recorded, and that parol testimony of matters which should be entered of record is only competent as secondary evidence. We held in *Tatlock & Wilson v. Louisa County*, 46 Iowa, 138, that the entry upon the records of the supervisors of the fact that a contract was made, is not necessary to its validity. The reason of this rule is obvious. A party contracting with the

Jordan & McCallum v. Osceola County.

supervisors has no authority or power to cause the contract to be noted in the record; this rests alone with the county officers. The law will not permit prejudice and loss to the party contracting with the supervisors, by reason of the negligent or intentional omission of the supervisors or the county officers to enter the fact of the contract upon the proper record. This rule is recognized in *Baker v. Johnson Co.*, 33 Iowa, 153, and in *Rice & Son v. Plymouth Co.*, 43 Iowa, 136.

II. Counsel insist that plaintiffs can recover upon an express contract only; and that as the action of the supervisors does not bind defendants there was no contract for employment. This position is based upon the ground that the county is not bound unless the contract be entered of record, a point we have just determined against the view of the counsel.

III. Counsel for defendant maintain that the county had no authority to employ counsel and it is not, therefore, bound by the contract whereby it employed plaintiffs. This court has held that a county may employ counsel to prosecute or defend an action. *Tatlock & Wilson v. Louisa Co.*, 46 Iowa, 138. It undoubtedly has the right to employ counsel to perform other services.

IV. It is urged that the supervisors are not authorized to bind defendant by a contract made by them individually, but must act as a board in session, in order to do so. This rule was substantially announced in the tenth instruction given to the jury.

V. It is lastly urged that the evidence fails to establish the contract of employment as well as other facts entitling plaintiff to recover. It is possible that the preponderance of the testimony is on the side of defendant, but it cannot be justly claimed that there is such absence of proof in support of the verdict as to justify the conclusion that it was not found in the intelligent and unbiased exercise of the discretion of the jury. It cannot, therefore, be disturbed.

AFFIRMED.

State v. Black.

STATE v. BLACK.

1. **Criminal Law: MISCONDUCT OF STATE'S ATTORNEY.** It is provided by section 3636 of the Code that the attorney for the State shall not refer to the fact that the defendant did not testify on his own behalf. In this case there was a contention as to the exact language used by the attorney, and as the District Court may be presumed to have heard what was said, it will also be presumed that that court was justified in overruling defendant's motion for a new trial based on the alleged misconduct of the attorney in that regard.

Appeal from Greene District Court.

FRIDAY, SEPTEMBER 22.

THE defendant was convicted of the crime of seduction. Judgment having been rendered upon the verdict, he appeals to this court.

No appearance for appellant.

Smith McPherson, Attorney-general, for the State.

ADAMS, J.—The defendant moved for a new trial on the ground of misconduct on the part of I. J. McDuffie, who acted upon the trial as attorney for the State. The alleged misconduct consisted of a certain statement made by the attorney for the State in the course of his argument to the jury. The words alleged to have been uttered are as follows: "They have not attempted to deny, except by plea of not guilty, the fact of having sexual intercourse with the young girl." The defendant was not examined as a witness in his own behalf.

Section 3636 of the Code, provides that the attorneys for the State shall not refer to the fact that the defendant did not testify in his own behalf. If the words used were those above set out, and which the defendant and his counsel show by their affidavits were used, it is difficult to resist the conviction that the attorney for the State did refer to the fact that the defendant did not testify in his own behalf, and if

State v. Henry.

the court was satisfied that he did make such reference, we think that the court should have set aside the verdict.

But the attorney for the State made an affidavit in which he said: "I did not in any form or manner refer to the fact that the defendant had not testified in his own behalf, or that he might have testified." Now, while the question is not as to what the attorney had in mind, but what he said, and while it would have been more satisfactory if he had made a direct denial of using the words attributed to him, yet it is possible that he intended to make such denial, and in view of the fact that the court may be presumed to have heard what was said, we think that we should be justified in construing the attorney's affidavit as containing such denial. We cannot say that the court erred in overruling the motion. We have to say, also, that we have examined the entire record and find no error.

AFFIRMED.

STATE v. HENBY.

59 301
96 306

1. **Indictment: Duplicity: Forgery and Uttering Forged Paper.** Forging and uttering forged paper are two distinct offenses, and cannot be charged in the same indictment:—following *State v. McCormick*, 56 Iowa, 585.
2. _____: _____: **ERROR WAIVED.** The objection that an indictment was bad for duplicity cannot be first raised in this court.
3. _____: _____: **SENTENCE MODIFIED.** In view of the fact that appellant's counsel may have waived rights by relying on *State v. Nichols*, 38 Iowa, 110, which had been recently overruled in *State v. McCormack*, 56 Iowa, 585, the sentence of defendant was modified and limited to the four years imposed upon the first count of the indictment.

Appeal from Floyd District Court.

FRIDAY, SEPTEMBER 22.

An indictment in two counts was presented against the defendant, charging him in one count with forging a note of

State v. Henry.

\$100, and in the other count with uttering as true the said forged promissory note. The defendant pleaded not guilty, and at the March term, 1881, was tried and convicted on both counts, and sentenced, on the first count to imprisonment for four years, and on the second count to imprisonment for two years, to commence at the expiration of the four years term. The defendant appeals.

J. S. Root, for the appellant.

Smith McPherson, Attorney-general, for the State.

DAY, J.—In *State v. McCormack*, 56 Iowa, 585, this court overruling *State v. Nichols*, 38 Iowa, 110, held that the forging and the uttering of forged papers could not be united in the same indictment. The decision in *State v. McCormack*, was announced in April, 1881, which was after the trial of this cause in the court below. In this case the defendant's attorney, following probably the rule announced in *State v. Nichols*, interposed neither demurrer, motion to require the State to elect on which count it would proceed, motion in arrest of judgment, objection to evidence, objection to sentence, nor motion for a new trial. The defendant waived the objection, which he might have urged, that the indictment charged two offenses, and went to trial upon an indictment charging in different counts offenses which should have been presented in two indictments. It is now urged that no legal conviction could be had upon the indictment because of its duplicity. We are of the opinion that this question cannot be for the first time raised in this court. See *State v. Groome*, 10 Iowa, 308; see, also, *Knoll v. The State*, 12 N. W. Rep., 369.

I. Appellant's counsel asks that if the fact of the duplicity in the indictment cannot avail to secure the defendant's release, it be taken into consideration in determining an application which he makes to have the sentence reduced. In view of the fact that appellant's counsel, may have waived rights upon which he might have insisted, because of the ru-

Redfield v. Miller.

ling in *State v. Nichols, supra*, we are of the opinion that the judgment of the court should be so far modified as to impose a sentence of four years alone, upon the first count of the indictment. Thus modified, the judgment is

AFFIRMED.

REDFIELD v. MILLER.

59 393
127 114

1. **Practice: FAILURE TO PLEAD IN TIME.** Defendant, by agreement was ruled to answer in thirty days; he failed to do so, and plaintiff moved for judgment by default:—*held* that under the circumstances (see opinion) the motion was properly denied.

Appeal from Lyon Circuit Court.

FRIDAY, SEPTEMBER 22.

THIS action was commenced in June 1880, and notice was served for the October term of the court in 1880. At that time plaintiff by consent took sixty days to amend his petition, and defendant was given thirty days thereafter to answer. The amendment was filed December 2, 1880, and on January 10, 1881, and in vacation, plaintiff filed a motion for default. The answer was filed January 20, 1881. At the next term of the court, which was held in October 1881, the plaintiff insisted on his motion for default, which motion the court overruled. The plaintiff refused to proceed further, and judgment was rendered against him for costs. Plaintiff appeals.

Ainsworth & Hobson and D. W. Clements, for appellant.

J. K. Thomson, and Joy & Wright, for appellee.

ROTHBOCK, J.—It will be observed that the answer was filed some eighteen days after the time fixed by consent of the parties. It was filed, however, eight or nine months

Hastings v. Phoenix.

before the next term of court. There is no pretense that the answer is in any way insufficient. There is the further consideration that the plaintiff introduced a new cause of action in his amendment. It should also be stated that the defendant in vacation made an application to the judge of the court below for an order extending the time for answer which was granted. It is true this application was without notice to the plaintiff. We think that under these circumstances there was no abuse of the discretion of the court in refusing the default taking into consideration the showing made in vacation, the fact that the amendment introduced a new cause of action, and, further, that no delay was occasioned by the failure to answer within the time. Courts should favor trials upon the merits.

AFFIRMED.

HASTINGS v. PHOENIX.

1. **Attachment: motion to discharge.** Where a motion was made to discharge an attachment based on the allegation that the defendant was about to remove his property out of the State without leaving sufficient for the payment of his debts, and said motion was supported by affidavits showing that the attached property was exempt, held that the motion should have been sustained under section 3018 of the Code.

Appeal from Palo Alto Circuit Court.

FRIDAY, SEPTEMBER 22.

ACTION in attachment brought before a justice of the peace. The defendant moved to discharge the attachment on the ground that the property levied on was exempt from execution. The motion was supported by an affidavit showing the property exempt. The court overruled the motion and rendered judgment for the plaintiff. Thereupon, the defendant caused the case to be removed to the Circuit Court upon a writ of error, and the Circuit Court affirmed the action of the justice in overruling the motion to discharge the attachment. The defendant appeals.

Hastings v. Phoenix.

George H. Carr and John Jenswold, for appellant.

P. O. Cassidy, for appellee.

ADAMS, J.—The case comes to us upon a certificate of appeal which is in these words: “In an action in a justice’s court aided by attachment, where the petition alleges as grounds for the attachment that the defendant is about to remove his property out of the State without leaving sufficient for the payment of his debts, should the justice entertain a motion to discharge a levy on the ground that the property is exempt, where said motion is supported by affidavits alleging the necessary facts to constitute the exemption?”

Section 3018 of the Code provides that “a motion may be made to discharge the attachment, or any part thereof, at any time before trial for insufficiency of statement of cause thereof, or other cause making it apparent of record, that the attachment should not have issued, or should not have been levied upon all, or part of the property held.” The affidavit filed in this case made it apparent of record that the attachment should not have been levied upon the property held. We are unable to discover any reason why the motion should not have been sustained. It is suggested that the court below thought that the alleged ground of attachment was controverted, but the alleged ground of attachment does not appear to affect the matter of exemption.

REVERSED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DAVENPORT, OCTOBER TERM, A. D. 1882.

IN THE THIRTY-SIXTH YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
" JAMES G. DAY,
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS, } JUDGES.

[59 397
123 22]

PATTERSON v. JOHNSON.

1. **Fraud: COVERING PERSONAL EARNINGS: STATUTES CONSTRUED.** Plaintiff entered into an arrangement with her brother, who was insolvent, whereby she rented a farm of a third person and employed her brother to cultivate it in the use of his farm implements, which were exempt from execution, the object being to enable the brother to employ himself and his implements at a certain rate per month, which would be exempt from execution, rather than to rent the farm himself and raise the crops, which would be subject to execution. *Held* that the transaction was not fraudulent in law, and that the crops could not be subject to the payment of the brother's debts.

Patterson v. Johnson.

Appeal from Jasper Circuit Court.

TUESDAY, OCTOBER 3.

ACTION of replevin for certain grain. The cause was tried without a jury and, upon facts found by the court, judgment was rendered for plaintiff. Defendant appeals. The facts of the case fully appear in the opinion.

H. S. Winslow, for appellant.

A. K. Campbell, for appellee.

BECK, J.—I. The defendant, who is a constable, seized the grain in controversy upon two executions in his hands issued upon judgments recovered against R. C. Patterson. The plaintiff claims the ownership of the property. The defendant alleges that the grain is the property of R. C. Patterson, and that plaintiff's claim thereto is fraudulent as to the creditors of R. C. Patterson, being based upon transactions and contracts intended to delay and defeat the collection of his debts, and especially his judgments upon which the executions in defendant's hands were issued.

The court found that the grain in controversy was grown upon a farm rented by plaintiff, who is the sister of R. C. Patterson; that at the time the lease was executed plaintiff entered into a contract with her brother to cultivate the farm and to furnish all the seed, teams and implements, and do all the work and bear all expenses of the farm, she agreeing to pay him therefor \$65 per month; that he was bound to make disposition of the crops as directed by the sister; that R. C. Patterson is, and was, insolvent prior to the lease and agreement with his sister, which was known to her; that he had rented the same farm for the preceding year of Deans and had executed a mortgage to plaintiff upon the crops raised for the purpose, on his part, of delaying and defeating his creditors, and that the mortgage was executed to secure a

Patterson v. Johnson.

debt he owed to his sister, but it is not shown that she knew of, and shared in, his fraudulent purpose. Other facts found by the court, so far as it is necessary to recite them, are stated in the following language of the findings:

"R. C. Patterson was living on the farm when the crops in question were raised, at the time both these contracts were made, and was then tenant of the Deans for the prior year. He found that if he rented the farm again and undertook to raise a crop there for the term covered by the lease to the plaintiff, his creditors would levy on his crops, and to avoid this danger, he procured his sister, the plaintiff, to rent the farm and induced her to hire him, as she did do, to the end that he might have employment, and prevent his creditors from attaching his wages or the fruits of his personal labor and earnings of and by the use of exempt property, and applying the same in payment of his debts, and the plaintiff made both of these contracts to aid her brother in so doing."

II. The findings disclose the fact that the purpose of plaintiff was to furnish her brother with employment for himself and such property as he used in farming which was exempt from execution, to the end that his earnings so made would be exempt from execution. The brother shared in this purpose. It is not found, nor was it claimed, that the contracts were not actually, and in good faith entered into; that it was not the purpose of both parties that plaintiff should become the actual tenant of Deans and should be bound by her contract with her brother. It appears that the inducements of these contracts were to enable the brother to employ his property exempt from execution, and his personal labor, so that his earnings would not be subject to his debts. It seems to be conceded, in this case, that his earnings by his personal labor, with the use of such property, would have been exempt from execution during the time prescribed by statute. It may, therefore, be inferred that he was the head of a family. Farming utensils and the team with which a farmer habitually earns his living, are exempt from execu-

Patterson v. Johnson.

tion. Code, § 3072. The earnings of a debtor for his personal services for ninety days are also exempt. Code, § 3074. These exemptions are secured to the heads of families. The provisions cited clearly exempt earnings of a farmer for personal services when using the property which is exempt from execution. We mean that his wages are exempt when he is hired, not that the crops he raises are exempt.

In the case before us R. C. Patterson was authorized by the law to contract for his personal services in connection with his exempt property, and to hold his earnings, for the time prescribed by the statute, free from the claim of his creditors. In making and performing the contract he committed no fraud—he executed a lawful right. It follows that plaintiff was guilty of no fraud. She was authorized to aid him in doing what the law regarded as honest on his part. It cannot be claimed that her connection with the transaction was a violation of law. This case somewhat resembles *Carn v. Royer*, 55 Iowa, 650.

We conclude that the transaction between plaintiff and her brother was not fraudulent, and that she acquired the *bona fide* title to the crops raised by her brother which are the subject of the action. The judgment of the Circuit Court is

AFFIRMED.

Harnett v. Harnett.

HARNETT V. HARNETT.

1. **Divorce: MOTION FOR NEW TRIAL ON IRRELEVANT EVIDENCE.** The wife had procured a decree of divorce from the husband on the ground of inhuman treatment. The husband asked a new trial on the ground of newly discovered evidence tending to show that the wife's relatives had unduly interested themselves in procuring the divorce. *Held* that, as such testimony would be immaterial to rebut the charge of inhuman treatment, it did not entitle the husband to a new trial.
2. ——: CONDONATION. The fact that the wife remained in the same house with the husband, and cooked and washed for him until the decree was rendered, did not amount to a condonation of the husband's offense.
3. **Practice: PETITION FOR NEW TRIAL: AMENDMENT TO.** Where an insufficient petition for a new trial was filed within the year provided by § 3157 of the Code, and, after the expiration of the year, an amended petition was filed, setting up facts which might be sufficient, *held* that the amended petition could not be regarded as a more specific statement of the original, and did not entitle the plaintiff to a new trial.

Appeal from Monroe District Court.

TUESDAY, OCTOBER 3.

THIS is a proceeding instituted by the plaintiff under § 3157 of the Code to procure a new trial in an action brought by the defendant, Elizabeth Harnett, against the plaintiff, her husband, to procure a divorce on the ground of inhuman treatment. The petition for a new trial is based upon the alleged ground of newly discovered evidence. The facts which the petition avers that he can now prove are in substance as follows: That Mrs. Harnett's father, one Pressley, endeavored to procure a person to swear falsely that the petitioner beat and abused his wife; that Pressley borrowed money to use in obtaining evidence in the divorce suit; that Pressley had said that he was always opposed to his daughter's marrying the petitioner; that Mrs. Harnett's sister asked a person to testify that he saw her children barefoot in the winter time; that the sister told another person that Harnett would be ashamed of the charge of cruelty brought against him, and

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would leave the country, and they would gain the whole case without a lawsuit; that the sister had been heard to say that Harnett had been too intimate with a Mrs. Jeffers, and that his wife must get a divorce; that Mrs. Harnett's niece had been heard to say that her aunt (Mrs. Harnett) would not live with Harnett much longer, but would get a divorce from him; that Mrs. Harnett's brother-in-law told one of the persons who testified in the divorce suit that he would pay his fees if he would testify against Harnett. The petition contains other allegations as to what different relatives of Mrs. Harnett said and did as constituting the facts which the petitioner avers that he can now prove, but they do not differ in character essentially from those above set out, so far as the allegations pertain to specific words and acts.

The petition also contains an allegation that the petitioner can prove that "the said Elizabeth Harnett lived with this plaintiff, and cooked and washed as she always had, until the final decision of the case." An amended petition contains an allegation that the petitioner can prove that "said Elizabeth Harnett, wife of petitioner, came to his house and lived with him, as stated in the original petition for a new trial; that while thus living with plaintiff, while said cause was pending and undetermined in the hands of the court, and during vacation, she and this petitioner had frequent and continued sexual intercourse as husband and wife, and that said intercourse was voluntarily indulged in by the said parties." The amended petition was not filed within one year from the time the decree of divorce was rendered.

The defendant demurred to the plaintiff's petition on the ground that the alleged facts, if proven, were immaterial, and had no tendency to controvert the charge of inhuman treatment, or show a defense thereto. She demurred to the amended petition on the ground that the same was not filed within one year from the time the decree of divorce was rendered. The court sustained the demurrer and refused a new trial. The plaintiff appeals.

Harnett v. Harnett.

Wm. Nichol and J. F. Lacey, for appellant.

Perry & Townsend, for appellee.

ADAMS, J.—The petitioner's theory is that, if he were allowed to show the sayings and doings of Mrs. Harnett's relatives, as averred in his petition, he could show a conspiracy among them to aid Mrs. Harnett in procuring a divorce. But in our opinion the alleged evidence is immaterial and not admissible. If Harnett had been guilty of such inhuman treatment as to endanger the life of his wife, she should not be deprived of the relief which the law allows in such a case by reason of anything which her relatives may have said or done. If she had received such treatment, it was natural, and perhaps commendable, in her relatives that they should manifest an active interest in her behalf. They were, to be sure, not justified in attempting to procure false testimony, and such attempt if made, however unsuccessful, might be regarded as showing an undue zeal, as well as the character of the persons who made it. But they are not on trial.

The allegation that the petitioner's wife lived with him and cooked and washed for him until the decree was rendered, appears to have been pleaded with the idea that such actions constituted condonation. But, in our opinion, merely remaining in the same house and doing the petitioner's work should not be regarded as having that effect. Her own necessities or those of her family might have been such that she was willing to sustain to him that relation, without any intention at any time of withdrawing her action, or forgiving him.

Whether the facts alleged in the amended petition could be set up after a decree as a ground for a new trial, we need not determine. They were not set up within the year allowed by the statute under which the petition was filed. The petitioner insists to be

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sure that the amended petition should be considered only as a more specific statement of the facts averred in the petition. But this position we think cannot be maintained.

In our opinion the court did not err in refusing a new trial.

AFFIRMED.

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•119 578

LAURENT v. CITY OF MUSCATINE.

1. **Taxation: EXEMPTION: PROPERTY USED FOR SCHOOL AND CHURCH.**

In order to exempt real estate from taxation under section 797 of the Code, use and ownership, either legal or equitable, must combine in the same person. In this case, where it appears that the legal title is in a private individual; though the property is used for a school and church, held that the property was not exempt.

Appeal from Muscatine Circuit Court.

TUESDAY, OCTOBER 3.

THIS action involves the question whether or not, certain real estate in the city of Muscatine is exempt from taxation. The Circuit Court held that it is exempt, and the city appeals.

Brannan & Jayne, for appellant.

Richman, Burk & Russell, for appellee.

ROTHROCK, J.—The cause was submitted to the court below on an agreed statement of facts of which the following is the substance:

The title to lot ten, which contains about two acres, is in John Hennessey of Dubuque, who is Catholic Bishop of the diocese in which said property is situated. The St. Mathias Catholic Church, and the school known as the Sisters's School, are situated on said lot. This lot is recognized and admitted to be exempt from taxation, for the reason that the same con-

Laurent v. City of Muscatine.

stitutes a part of the grounds and buildings of said church and school and is devoted to the appropriate objects thereof, and no tax has been levied thereon since the same was acquired and used for said purposes and objects.

About twelve years ago, the plaintiff, the officiating pastor of said church, acquired the title to the property, the tax on which is now in controversy. It consists of certain lots, and contains about two acres, and there has been erected thereon a parsonage for the use of the officiating pastor of said church. The lots, the title to which is in Bishop Hennessey, and those the title to which is in plaintiff, are all within the same enclosure and all are used together. There is no means of gaining access with teams, wagons, or carriages to said church and school, except by passing over the said lots of the plaintiff. All of the above named lots are used exclusively for, and constitute the grounds of, said church and school, and the lots to which plaintiff has title are also used as the play-grounds for the children attending said school, and also as the place of residence of said pastor. No compensation is paid to plaintiff for the use and occupation of the lots, and no part is leased or otherwise used with a view of securing profit. The plaintiff not only acts in the capacity of pastor of the church, but also as a teacher in the school. On the 12th day of August, 1878, plaintiff made and executed a will by which he devised said real estate to Rev. Cosgrove for the use of said church.

We are required to determine whether, under the foregoing facts, the lots to which plaintiff holds the title are exempt from taxation. If exempt, it must be under the provisions of section 797 of the Code. That section provides "that all public libraries, grounds and buildings of literary, scientific, benevolent, agricultural and religious institutions and societies, devoted solely to the appropriate objects of these institutions, not exceeding 640 acres in extent, and not leased or otherwise used with a view to pecuniary profit," are free from taxation.

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If the title to this property were in the church, or in the school, as a corporation, or possibly if it were shown that the plaintiff merely held the naked legal title in trust for the school or church, the case would be within the rule adopted in the case of *Griswold College v. The State*, 46 Iowa, 275. But in this case the lots are not the property of the church or of the school. It does not even appear that either the church or school has any equity in the lots by reason of having expended money in their improvement or otherwise. It is true the church and school have used the premises; but this alone is insufficient. By the agreed statement of facts the lots are the private property of the plaintiff. The fact that he has made a will and devised them to another for the use of the church cannot, we think, affect the question. The will confers no right during the life of the plaintiff, and may be revoked at any time.

The fact that the other property, the title to which is in the bishop of the church, has not been regarded as liable to taxation, cannot be allowed to affect the question. It is said that, by the law and usages of the church, the property is held by the bishop in trust for the church. We cannot take judicial notice of such law and usage, and, if it were a material question in this case, we incline to think, for aught that appears in the agreed statement of facts, all of the property in the common enclosure is subject to taxation, for it is not shown that the church has any equitable interest in any of it. In view of the oft repeated rule that taxation is the rule and exemption the exception, we think this property is not exempt. In our opinion, use and ownership, either legal or equitable, should combine, in order to effect the exemption.

REVERSED.

Hammond v. Leavitt.

HAMMOND V. LEAVITT ET AL.

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1. **Mortgage: REDEMPTION FROM BY PURCHASER UNDER JUNIOR JUDGMENT.** The plaintiff was an execution purchaser of land on a judgment which was a lien upon the land subsequent and inferior to defendant's mortgage, which was due, and plaintiff brought this action to redeem from the prior mortgage and to be subrogated to the rights of the mortgage; *held*, that such right to redeem and to be subrogated existed at common law, and that there is nothing in our statute abrogating that right.

Appeal from Black Hawk Circuit Court.

TUESDAY, OCTOBER 3.

ACTION IN EQUITY. Decree for the plaintiff, and defendants appeal.

Boies & Couch, for appellant.

C. W. Mullen, for appellee.

SEEVERS, CH. J.—I. The facts briefly stated are that the defendants are the owners of a prior mortgage on real estate and the plaintiff is the owner of a judgment against the mortgagor which is a lien on the mortgaged premises. The plaintiff caused execution to issue on his judgment, and thereunder the premises were sold, the plaintiff being the purchaser. After six, but before the expiration of nine months, from the sale, the plaintiff tendered the defendants the full amount due on the mortgage, all of which was then due and payable, as and in redemption of the premises from such mortgage, and sought to be subrogated to all the rights of the mortgagee. The defendant refused to accept the tender and denied the plaintiff's right to redeem and to subrogation. This action was brought to enforce such right. It is conceded by counsel on both sides that the right attempted to be exercised by the plaintiff existed at common law, or in the absence of any legislation on the subject.

1. **MORTGAGE:**
redemption
from by pur-
chaser under
junior judg-
ment.

Hammond v. Leavitt.

We shall not stop to inquire and state the ground upon which the rule is based. Counsel for the appellant insist such rule has been abrogated by statute, or that the provisions thereof are inconsistent with the exercise of such right; that a judgment or lien-creditor under the statute may, after the foreclosure of a prior mortgage, redeem therefrom, is conceded, but that this may be done before foreclosure, is denied by counsel for appellant. It is said, if this is so, then the debtor and creditor entitled to the prior lien cannot make any arrangement for the extension of the time of payment of the prior encumbrance. But is this so? Suppose, before the offer to redeem is made, the debtor and creditor have entered into any arrangement whereby an extension of the time of payment is granted and the same is a binding contract as between them, does it necessarily follow a junior creditor by redeeming can put an end to such contract? As there is no such question before us, we content ourselves with stating without undertaking to determine it.

Of course it is in his power, and it is just as competent for the senior creditor to grant an extension after foreclosure of the prior mortgage as it was before that time. Now, if a junior creditor can redeem after foreclosure, as he certainly may, why not before? It is said section 3103 of the Code gives the debtor the exclusive right for six months after the sale to redeem, and to permit a junior creditor to redeem before sale is inconsistent with this provision of the statute. To an extent, this is so, but the debtor can prevent such redemption by doing that which it is his duty to do, and that is to pay the junior lien. It is true section 3109 of the Code in terms provides the junior creditor may redeem from the senior if execution has been issued. This gives a right which did not exist before, or at common law, but it does not negative or take away any existing or prior right possessed by the junior creditor. We are unable to discover any provision of the statute which negatives or takes away the right of the junior creditor to redeem from a prior mortgage previous to

Smith v. Griffin.

the foreclosure thereof. Besides this, the equity of redemption of the mortgagor in the premises may be sold under the statute by a junior judgment creditor. The purchaser at such sale, if there is no redemption therefrom, becomes vested with the right and title subject to the prior encumbrance. He, in fact, is the owner of the premises, subject to the encumbrance, and must therefore become possessed with all the rights of an owner, among which is the right to pay off an encumbrance. The owner may assign his right to redeem to another. Code, § 3123. A sale of the equity of redemption has the same effect as the voluntary assignment by the debtor of the right to redeem.

AFFIRMED.

SMITH v. GRIFFIN ET AL.

1. **Judgment: PERSONAL, ON MOTION BY PUBLICATION ONLY, VOID.** Where notice was by publication only, in an action aided by attachment, though the court *might* have rendered a judgment *in rem* under which the land in question might have been sold, yet, as the court did in fact render a *personal* judgment against the defendant, on which the land was sold, *held* that such judgment was absolutely void for want of jurisdiction, and the sale of the land thereunder was also void.
2. **New Trial: STATUTE CONSTRUED.** Section 2877 of the Code, which authorizes a retrial within two years of all cases where judgment by default has been rendered against one served by publication only, has no application to the case of a judgment void for want of jurisdiction to render it.

Appeal from Delaware District Court.

TUESDAY, OCTOBER 3.

THIS is an action in equity, commenced on the 7th day of June, 1875, to set aside a judgment recovered by M. E. Griffin against the plaintiff, and to cancel the sale and sheriff's deed thereunder to Simeon B. Griffin. The court granted the plaintiff the relief prayed. The defendants appeal. The material facts are stated in the opinion.

59	409
89	140
59	409
92	639
59	409
128	640

Smith v. Griffin.

A. E. House, Charles Husted and Ray B. Griffin, for appellants.

Bronson & LeRoy, for appellee.

DAY, J.—In April, 1868, the defendant M. E. Griffin commenced an action against the plaintiff upon account for \$200, for professional service, assigned to M. E. Griffin by the defendant Ray B. Griffin. An affidavit that the defendant in that action, George Smith, was a non-resident was made, and an attachment was prayed. Notice was served by publication, and a writ of attachment was issued and levied upon the south half of section 9, township 88, range 5.

At the October term, 1868, the defendant was adjudged in default for want of appearance or answer, and it was “considered and adjudged by the court that the plaintiff have and recover of the defendant the sum of two hundred dollars, together with the costs of this suit taxed, at \$12.35, and that execution issue therefor.” Under this judgment a special execution issued directing the sheriff to levy upon and sell the south half of section 9, township 88, range 5, previously attached in said cause, or so much thereof as may be necessary, etc. Under this execution the sheriff levied upon the south half of said section, and, on the thirtieth day of January, he sold under appraisement, to Simeon B. Griffin, five distinct ten acre tracts thereof for the aggregate price of \$268.75, and executed to him a sheriff’s deed therefor.

On the 17th day of May, 1872, Simeon B. Griffin conveyed said land by warranty deed to U. T. Brown, now deceased, whose heirs are parties defendant to this action.

I. The judgment rendered in the case of *Simeon B. Griffin v. George Smith*, is a personal judgment. In a proceeding by attachment, when the defendant has not been personally served with process, the judgment should be *in rem* only, and not *in personam*. Code, § 2881. *Wilkie & Tuller v. Jones*, Morris, 97; *Doolittle v. Shelton*, 1 G. Greene, 272; *Johnson v. Dodge*, 19 Iowa, 107; *Hakes v. Shupe*, 27 Id.,

Martin v. Central Iowa Railway Company.

465. This case is in principle identical with *Lutz v. Kelley*, 47 Iowa, 307, in which it was held that a mere personal judgment in an action of foreclosure, against non-residents served personally outside of the State and by publication, was void and did not authorize a sale of the mortgaged property. In that case the court might have rendered a judgment of foreclosure, but did not do so. In this case the court might have rendered a judgment *in rem*, but did not do so. It is impossible to distinguish the cases. It follows that the judgment and the subsequent proceeding in this case must be held to be void.

II. It is claimed that the plaintiff is remediless because he did not commence this action within two years of the rendition of the judgment as provided in section 2877 of the Code. This section authorizes a retrial in all cases where a judgment by default has been rendered against one served by publication only. It has no reference to a case wherein the judgment is void because of a want of jurisdiction to render it. The case of *Bond v. Esplv*, 48 Iowa, 600, relied on, is not applicable. The judgment is

AFFIRMED.

50 411
83 889

MARTIN v. CENTRAL IOWA RAILWAY Co.

1. **Railroads : NOTICE OF DAMAGE TO STOCK: MISNOMER OF DEFENDANT.** Where horses were killed by the *Central Iowa Railway Company*, and the owner of the horses caused to be served on a proper officer of that company a notice of the injury, as contemplated by section 1289 of the Code, which notice was, however, addressed to the *Iowa Central Railway Company*, held, in an action for double damages, that the misnomer did not invalidate the notice, under the rule that "the omission, alteration or transposition of any of the words, if the words in the name used are synonymous with the true name of the corporation, is not a misnomer that will defeat the notice." ADAMS, J. dissenting.
2. **Evidence: RELEVANCY.** The pleadings in a former action against defendant held properly admitted in evidence as showing that defendant became the owner of the railway before the killing of plaintiff's horses—that being a point in issue.

Martin v. Central Iowa Railway Company.

3. **Instruction: NOTICE OF DAMAGE.** An instruction to the effect that the notice (referred to in the first point, *ante*), was good, if plaintiff intended to serve it upon the defendant and the misnomer was a mistake, but that, if plaintiff intended to serve it on some other company, defendant was not liable for double damages, *held* correct.
4. **Verdict: SPECIAL INTERROGATORIES: MODE OF ANSWER.** Where special interrogatories were submitted to the jury and the court directed the jury that, if they could not answer the questions by "yes" or "no," they might answer them in some other manner, and the jury answered "we think" and "have reason to believe," *held* that these answers presented in positive language the conclusions reached by the jury, and sufficiently expressed the findings of fact sought by the questions.
5. **Practice in the Supreme Court: VERDICT: EVIDENCE TO SUPPORT.** The evidence in this case being considered and found to be conflicting, this court will not interfere with the judgment rendered on the verdict.

Appeal from Monroe District Court.

WEDNESDAY, OCTOBER 4.

ACTION to recover double the value of certain horses killed and injured by a train upon the road of defendant at a point where it had a right to construct fences. There was a verdict and a judgment for plaintiff; defendant appeals.

Perry and Townsend, for appellant.

H. A. Dashiel, for appellee.

BECK, J.—The facts, as far as they are necessary to a proper understanding of the case, will be stated in connection with the discussion of the several questions we are required to pass upon.

I. The notice showing the injury to the horses, required by the statute as the foundation of the claim for double the value of the property, was addressed to the "Iowa Central Railway Co." Defendant objected to its admission in evidence on the ground that it was not addressed to defendant by its proper style, its corporate name being "The Central Iowa Railway Co." The notice was admitted in evidence.

Counsel for defendant insist that, as the notice was not ad-

Martin v. Central Iowa Railway Company.

dressed to defendant by its proper style, it does not comply with the requirement of the statute. Code, § 1289. There is no question but this notice was served upon a proper officer of defendant. We are required to determine whether the misnomer of the defendant, occurring in the address of the notice, will justify defendant in claiming that the notice required by the statute was not given. We may concede that the notice should be addressed to the railroad corporation, a matter of doubt which we do not decide. Does the misnomer invalidate the notice? We think not. The name of defendant consists of a number of words. The omission, alteration or transposition of any of the words, if the words in the name used are synonymous with the true name of the corporation, is not a misnomer that will defeat the notice. See Angell and Ames on Corporations, 9th Ed., Sec. 99 and notes. It cannot be doubted that the name "Iowa Central Railroad Co." the name used in the notice, is synonymous with the true name of the corporation, viz., "The Central Iowa Railway Co." We conclude that the court did not err in admitting the notice in evidence.

II. The plaintiff was permitted to introduce in evidence the pleadings in a case brought by the Hawkeye Telegraph ^{2. EVIDENCE:} Company against the defendant, which shows that defendant, prior to the injury to plaintiff's horses, acquired the railroad by purchase, under the foreclosure of a mortgage executed by the Central Railroad Company of Iowa. Counsel for defendant insist that this evidence is "irrelevant, immaterial and incompetent."

We confess that the materiality of the evidence is not made plain, except so far as it tended to show that defendant had acquired the road before the plaintiff's horses were injured. Without inquiring into the materiality and relevancy of the evidence as to other matters, we reach the conclusion that it was relevant and competent upon this point which was put in issue by the pleadings.

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III. Counsel for defendant insist that the eleventh instruction given to the jury is erroneous, in that it directs the ^{3. INSTRUCTION: notice of damage.} jury to determine the sufficiency of the notice considered in the first point of this opinion. We think the instruction does not have the effect to leave to the jury the sufficiency of the notice. It holds the notice good, if plaintiff intended to serve it upon defendant and the misnomer was a mistake, but if plaintiff intended it for some other company, defendant is not liable for double damages. The instruction in holding the notice to be sufficient, unless it was not intended to be served upon defendant, is correct.

IV. The horses of plaintiff were injured during the night of December 26, 1879, and the circumstances showed that ^{4. VERDICT: special interrogatories: mode of answer.} the train which inflicted the injuries was running south. A witness testified that a train on the road did run south that night. Defendant introduced its employes having control of the running of trains, who testified that but one train, "No. 6," ran south on the road that day. At defendant's request the following special interrogatories were submitted to the jury:

"1. Did the defendant run any trains after night, south of Eddyville, after No. 6 went south from said town, in the afternoon of the 26th of December, 1879?

"2. Were plaintiff's horses struck by train No. 6 going south from Eddyville on the day last aforesaid."

The record shows that the court directed the jury, "if they could not answer the questions by answers 'yes' and 'no,' that they might answer them in some other manner."

The jury in their answer say that they "think" and "have reason to believe" that there was another train besides No. 6, and that they "think" the horses were not struck by No. 6. The answers present in positive language the conclusions reached by the jury. The word "think" means "to believe," to consider, to esteem; it sufficiently expressed the findings of the facts sought by the questions.

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V. Counsel for defendant insist that the evidence does not support the verdict, in that defendant's employes testified that no train other than No. 6 ran south on the day of the accident. Their testimony is based upon records of the running of trains kept by them, and not upon their independent memories. The record shows that no train ran south on the night of the 27th of December. On the other hand, a witness testifies that she heard and saw a train running south on the night of the 26th of December. She is positive of the date, and associates it in her mind with the facts that she saw the horses on Christmas day, heard of the injury to them the morning after it occurred, and saw them again two days after they were injured. Counsel for defendant insist that this witness was mistaken as to the night she saw the train. It may be replied that defendant's employes may have, through mistake, entered the date of the train running south on the 27th instead of the 26th. Such mistakes in dates are not uncommon. It is quite true that the witnesses on either side of the case may have been mistaken as to the date. But plaintiff's witness is supported by the circumstances showing the cause and place of injury. It clearly appears that the horses were upon, and were thrown or fell from, a bridge, fifteen feet high and sixty feet long. Tracks of the horses appeared on the railroad near the bridge, and blood and hair of the color of the horses, were found for half the distance across the bridge upon the ties, tending to show that the animals had been there dragged along. That the horses were upon the bridge and dragged along by some power, is plain. The jury, understanding the habits and instincts of the horses, were authorized to conclude that they did not go voluntarily upon the bridge, and that it would require a score or more of men to drive them upon it, if the thing, indeed, be possible. Then the appearance of the bridge, showing that the horses were dragged over it, indicated they were injured by no other means than the train. The time of the injury was without doubt at night. The jury could

Gulliher v. The C. R. I. & P. R. Co.

come to no other conclusion than that a train passed the bridge going south, regardless of the condition of the record of the running of the trains, as shown by the testimony of defendant's employes.

While it may be conceded the evidence is conflicting, it surely cannot be claimed that there was such an absence of proof as would justify us in reversing the judgment. Indeed, some of us think, that the strong preponderance of the evidence is on the side of plaintiff. We have considered all questions discussed by counsel, and reach the conclusion that the judgment of the District Court ought to be

AFFIRMED.

ADAMS, J., dissents to the first point of this opinion.

GULLIHER v. C., R. I. & P. R. Co.

59	416
88	238
59	416
89	656
90	374
59	416
108	225
59	416
135	604
59	416
144	712

1. **Practice: NOTICE OF APPEAL: EXCEPTIONS.** Where, during the trial, numerous exceptions were taken to the ruling of the court, many of them to the giving and to the refusing to give instructions, and on June 21st there was a verdict and judgment for plaintiff, but no formal exception entered at the end of the judgment entry, and on June 24th defendant filed a motion to set aside the verdict and for a new trial, setting out the errors complained of pending the trial, and also that the verdict was not supported by sufficient evidence and was contrary to law, which motion was, on June 27th, overruled, to which ruling defendant at the time excepted, *held*,
 1. That the exception taken to the ruling denying a new trial was a sufficient exception to the judgment.
 2. That a notice of appeal from the *judgment* rendered on the 21st day of June properly brought up in the Supreme Court all the objections properly saved on the trial of the case, including the motion for a new trial.
2. — : INSTRUCTIONS: FRAUD. Where fraud in procuring a written contract of settlement was pleaded to avoid the effect of the writing, but the facts proved did not constitute fraud, the court should, when requested, have instructed the jury that there was no evidence of fraud.
3. **Contract: NEGLIGENT SIGNER BOUND.** It is well settled that where a party having capacity to read an instrument signs it without reading it, and without requesting it to be read to him, he is bound thereby, if no device is used to put him off his guard.

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4. **Practice: SPECIAL INTERROGATORIES.** When defendant requested the court to submit to the jury special interrogatories, few in number, easily understood and not tending to confusion, which called for answers to ultimate facts in issue, and which were not vulnerable to any valid objection, the request should have been granted.

Appeal from Lee Circuit Court.

WEDNESDAY, OCTOBER 4.

This is an action to recover for a personal injury received by the plaintiff while in the employment of the defendant and engaged in coupling cars. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals. The facts appear in the opinion.

Anderson Bros. & Davis and M. A. Lovv, for appellant.

Dryden & Dryden and Hagerman, McCrary & Hagerman, for appellee.

ROTHROCK, J.—I. During the progress of the trial numerous exceptions to the rulings of the court were entered at

the instance of the defendant. These exceptions were principally made to the refusal by the court to give instructions to the jury. The verdict was returned on the 21st day of June, 1881, and judgment was entered on the same day. There is no formal exception entered at the end of the judgment entry. On the 24th day of the same month, the defendant filed a motion for a new trial which set out the errors complained of pending the trial, and also the objection that the verdict was not sustained by sufficient evidence, and was contrary to law. This motion was overruled on the 27th day of June, and the defendant excepted to the ruling at the time. The body of the notice of appeal is in these words: "You are hereby notified that defendant in the said action has appealed from the judgment of the Circuit Court aforesaid, in favor of plaintiff, at the June term, 1881, on the 21st day of June, 1881, to the Supreme Court of Iowa, and that said appeal will come on for

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hearing and trial at the regular term of said court to be held at Des Moines, commencing on the first Monday of June, 1882."

The plaintiff by a motion seeks to have all the instructions to the jury, including those given and refused, and the assignments of error, and other parts of the record objected to by appellant, stricken from the record, because the notice of appeal is not sufficient to bring up any ruling except the judgment entry. In other words, it is claimed that the appeal has not been taken from any ruling or act of the court excepting the entry of judgment. It is further claimed that no appeal will lie from the judgment because it was not excepted to.

These objections to the standing of appellant in this court are urged at length and with great earnestness, and reliance is placed on section 3178 of the Code which is as follows:

"An appeal is taken by the service of a notice in writing on the adverse party, his agent or attorney who appeared for him in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part."

It is argued that, as the appellant in its notice defined the judgment as the part appealed from, it cannot be heard to complain of any other part of the proceedings, and, as he did not except to the judgment, it cannot be heard to complain of that. It is urged that the appellant should have stated in the notice that it appealed from the "proceedings," and that the use of the word "judgment" instead is not sufficient. It appears to us that this is a very technical view to take of the statute. We have no disposition to go into nice technical distinctions as to the meaning of the word "proceedings". If we were to hold that a notice in the form of that found in the record in this case does not bring up all of the objections properly saved upon the trial of the case, including the motion for a new trial, we would surprise the profession through-

Gullifher v. C., R. I. & P. R. Co.

out the State, and, no doubt, with one dash of the pen, dispose of about nine-tenths of the appeals now pending for submission in this court.

It remains to be determined, so far as this question of practice is involved, whether the appellant has lost all right to complain of the judgment because no exception was noted thereto at the time it was entered. The verdict was found June 21st, and judgment was entered the same day. The defendant, as was its right, filed its motion for a new trial within three days. Code, § 2838. It had this right, no matter what judgment had been entered up in the meantime. This motion for a new trial, and to set aside the verdict, set forth fully the errors complained of. It was as much an attack on the judgment as on the verdict, for the former could have no validity without the latter. If the motion had been sustained, the judgment would have gone with the verdict. But the motion was overruled, and to the ruling defendant excepted. That is, the exception was to the ruling denying a new trial. This was a sufficient exception to the judgment.

In *Aldrich v. Price*, 57 Iowa, 151, we held that, where a motion in arrest of judgment was overruled and the ruling excepted to, it was unnecessary to except to the judgment afterwards rendered. And in *Barnhart v. Farr*, 55 Iowa, 366, where no exception was taken to the judgment, we held that an exception taken to the conclusion of law upon which the judgment was founded was sufficient.

We are cited by counsel for appellant to *Eason v. Gester*, 31 Iowa, 475; *Joliet Iron & Steel Co. v. C. C. & W. Railway Co.*, 50 Iowa, 455; *Redding v. Page*, 52 Iowa, 406; and other cases which, it is claimed, hold that the judgment entry must be excepted to. An examination of those cases will show that they are unlike the case at bar. None of them determine the effect of an exception to the overruling of a motion for a new trial where a judgment has been actually entered after verdict and before the motion is made.

II. The defendant in its answer set up as a settlement of

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the cause of action an instrument in writing in the following language:

“K. & D. M. DIVISION.

"Name, John G. Gulliher, Keokuk. For the consideration of \$104.68 received of the Chicago, Rock Island & Pacific Railroad Co., I hereby release and discharge said company from all claims and demands against it, and especially from all liability for loss or damage to me by reason of having my thumb and two fingers on left hand crushed while coupling cars in yard at Keokuk station (which necessitated the amputation of said thumb and two fingers), which occurred on or about the third day of March, A. D. 1879.

"Received payment, Keokuk, Iowa, April 30, 1879.

“Keokuk Division.

"JOHN G. GULLIHER [L. S.]"

Examined and correct,
C. F. WINSLOW, Auditor.
F. K. HAIN, Approved.
A. KIMBALL, Gen'l Sup't.

The above was read to and signed by the said John G. Gullicher in our presence, at Keokuk, on the 30th day of April, 1879.

W. K. Lucas.

C. H. HAIN.

The plaintiff replied to the plea of settlement by averring in substance that a paper which purported to be a receipt, ^{2. — : in- struction:} but which he supposed to be a receipt for time fraud, lost, was obtained from him, but that it was obtained through fraud and misrepresentation. The reply does not set forth in what the fraud and misrepresentation consisted. The court gave to the jury the following among other instructions upon this branch of the case:

"13. The defendant pleads a settlement in full with the plaintiff for the injury complained of, and sets out a copy of the contract of settlement and receipt relied upon in his answer; plaintiff does not deny the genuineness of the signature under oath thereto, and it must in law be deemed genuine and admitted, and the burden of proof rests upon plaintiff to show that it was procured by fraud. If he has not so shown, your verdict should be for the defendant.

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"14. If the jury find from the evidence that plaintiff signed the receipt in evidence by reason of the fraud of the managers of the defendant, who by fraud and artifice induced him to believe that it related only to money due him for time lost, and that it had nothing to do with his claim for damages sued for herein, and if he (the plaintiff), by the fraudulent act of said defendant, or its managers, did not know it covered his claim for damages, then said receipt would be no bar to the recovery of the amount claimed in this action."

The defendant excepted to these instructions, and asked the court to instruct the jury that the evidence did not sustain the allegation of fraud in procuring the written instrument, and that the verdict should therefore be for the defendant.

We have searched the record in vain for any evidence of fraud in procuring the release, and we think the court should have stated to the jury that there was no such evidence, and, under the thirteenth instruction above set, out the jury should have so found.

Plaintiff's counsel claim that the abstract of the defendant does not purport to be an abstract of all the evidence, and that, therefore, the evidence cannot be considered. This we think is a mistake. We need not set out our reasons for this holding, at length. The objection to the recitals in the abstract are too trivial to require extended notice.

This instrument in writing is more than a mere receipt; it is a contract of settlement, and is binding on the parties unless it was procured by fraud. The plaintiff states that at the time he signed some paper, which it appears was the release in controversy, he did not read it and, "as his mind served him," it was not read over to him, but that he supposed it was merely a receipt for pay for the time he had lost by reason of the injury, and that he was led into this belief by previous communications with the superintendent of the company. He further states that his hand pained him greatly

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at the time he affixed his signature. But he does not state that any false representation was made to him when he signed the release, nor that he was unable to read it, nor that an examination and reading of it was refused him. It is true that he states that some time before the release was made he was promised that a house would be bought for him at Bentonport, so that he need not pay rent, and employment was to be given him there by the defendant. Whether the title to the house was to be made to him does not appear. These promises are claimed to be fraudulent. They cannot be claimed as fraudulent representations. They are but promises to be performed in the future, which are everywhere held to be insufficient to avoid contracts on the ground of fraudulent representations. Whether such false promises may be made the basis of an action for damages we need not determine.

It is well settled that, when a party having capacity to read an instrument signs it without reading it, and without requesting it to be read to him, and if no device is used to put him off his guard, he is bound by it.

^{3. CONTRACT:} <sup>negligent
signer of
bound.</sup> *McCormack v. Molburg*, 43 Iowa, 561, and cases cited. It is claimed that under the ruling in *Hopkins v. Hawkeye Insurance Company*, 57 Iowa, 203, the plaintiff in this case is entitled to be relieved from the contract. That was a case where a person, unable to read the writing by reason of the loss of his spectacles, relied upon the agent of the defendant to read the instrument to him, who read it falsely, and with intent to defraud him. It was held that under the evidence it was proper to submit to the jury the question whether or not the plaintiff exercised reasonable care and diligence to ascertain its contents. The rule in *Molburg's* case was in no manner questioned, but was approved.

We are cited to the cases of *Ill. Cent. R. R. Co. v. Welch*, 52 Ill., 183; *Schultz v. C., & N. W. R. R. Co.*, 44 Wis., 638; and *C. R. I. & P. R. R. v. Doyle*, 18 Kas., 58, as holding that (in the language of counsel) "if the employe,

Gullher v. C., R. I. & P. R. Co.

after injury, signs a receipt for all damages sustained, without knowing its contents, or without intending to sign such an instrument, but under the belief that it was merely for time lost while laid up with the injury, then the receipt is no bar." If the law upon this question be as broad as stated by counsel, courts might about as well declare at once that all the rules governing contracts in writing are abrogated. All that would be required to avoid them would be to show that the party charged signed the instrument without knowing its contents. In the first case cited, the trial court instructed the jury that an instrument much like that in the case at bar did not release the cause of action. The cause was reversed because of this instruction. The court said: "The release is in terms sufficiently broad to cover the present action." The question as to what fraudulent acts or devices would avoid the release, was not in the case, and what is said by the court on that subject implies that, to avoid it, there must be false representations used in obtaining the release. In the case of *Schultz v. R. R. Co.*, it is said that "if the plaintiff signed the alleged discharge or acquittance without knowing its contents, and not intending to sign such an instrument, he is not bound by it." The question received no other or further consideration. If the court intended by this remark to exclude the idea of fraud in obtaining the signature to the instrument, we cannot assent to the doctrine of the case. It is proper to say, however, that the question of negligence in signing the instrument was not made nor discussed in the case.

In the case of *R. R. Co., v. Doyle*, it appears that the party who signed the receipt was not in his right mind and did not know what he was doing when he signed the instrument. Of course, the fact that the party was mentally incompetent to contract would avoid any instrument signed by him while in that condition. In the case at bar no such issue was made in the pleadings nor referred to in the instructions.

We need go no further in this case. The judgment must

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be reversed, because there was no evidence that the release was obtained by fraud. But, lest this might be construed as an approval of the action of the court in refusing to submit to the jury the special interrogatories asked by the defendant, we will say that we think they should have been given. They call for answers to ultimate facts in issue in the case, are few in number and easily understood, do not tend to confusion, and are not vulnerable to any valid objection.

REVERSED.

MILLER V. AYRES ET AL.

1. **Judicial Sale: MORTGAGE FORECLOSURE: REDEMPTION BY SURETY.** Where there has been the foreclosure of a mortgage for the collection of a note secured thereby, a surety on the note, against whom judgment was also rendered in the proceeding, has no right to redeem the mortgaged property from the purchaser at the foreclosure sale.
2. ——: **REDEMPTION: "DEFENDANT" DEFINED.** The term "defendant" in our statute concerning redemptions *held* to mean, in the case of a mortgage foreclosure, the mortgagor or person holding the legal, or possibly the equitable, title subject to the mortgage.
3. ——: ——: **ESTOPPEL.** He who seeks to redeem from a sale thereby affirms the validity of the sale.

Appeal from Marion Circuit Court.

WEDNESDAY, OCTOBER 4.

THE plaintiff was surety for one Keefer on a promissory note, given to the school fund, which was secured by mortgage. The mortgage was foreclosed and the real estate sold to the defendants. Shortly previous to the expiration of twelve months from the sale, the plaintiff sought to redeem by depositing the proper amount of money in the clerk's office. His right to do so was denied, and this action brought to enforce such right. There was a decree for the defendants and plaintiff appeals.

Miller v. Ayres.

John F. Lacy, for appellant.

Stone, Ayres & Co., for appellees.

SKEVERS, Ch. J.—In 1875, H. B. Keefer, I. K. Casey and the plaintiff, executed a note to the school fund; Keefer was the principal debtor, and Casey and the plaintiff his sureties. Keefer and wife executed a mortgage on certain real estate to secure the payment of the note. Afterwards, Keefer gave a mortgage on the same premises to Dunlap & Upham. This mortgage was first foreclosed but no persons were made parties to the proceeding but Keefer and wife. This decree stated the school fund mortgage was the prior lien. The mortgaged premises were sold under the Dunlap and Upham decree in February 1877, and the sheriff had conveyed the premises to the purchasers prior to the time the plaintiff made an attempt to redeem as hereafter stated. The school fund mortgage was duly foreclosed. Keefer, Dunlap & Upham, Casey and the plaintiff were made defendants, but no notice was served on Keefer; nor did he appear to the action. The decree of foreclosure recited the proceedings under the Dunlap & Upham mortgage and stated they were the owners of the mortgaged premises. It also provided a special execution should issue for the sale thereof, and if the judgment was not thereby satisfied a general execution should issue against Casey and plaintiff. The equity of redemption of Dunlap & Upham was cut off by the decree. The premises were sold under the special execution and purchased by the defendant, Ayres. The right of Keefer to redeem from such sale expired December 20th 1879. Five days before that time the plaintiff paid to the clerk the proper amount of money to redeem from said sale, and the question to be determined is whether he had such right. Such question was presented in the court below by demurrer to the answer.

We have stated the material facts upon which the right claimed by the plaintiff depends, and think the case can be

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better determined thereunder than it can by setting out at length the several pleadings. Counsel for the plaintiff insist

1. JUDICIAL a surety has the right to redeem to the same ex-
sale: mort-
gage foreclos-
ure: redemp-
tion by surety. tent as the principal debtor, and when he does so, he is entitled to be subrogated to all the rights of the creditor. Authorities are cited in support of this proposition. That a surety before a sale may pay off the debt and be subrogated to the rights of the creditor is possibly true. The authorities cited do not, we think, go farther than this. But the right of any person to redeem after a sale under a mortgage foreclosure depends upon the statute. If there is no statute so providing, there is no such right. The statute does in terms provide that the principal debtor may redeem within twelve months after the sale. But it does not in terms provide a surety may do so. If the latter can exercise the right, it must be deduced from the statutory provisions recognizing the right of redemption from sales under execution. Section 3102 of the Code provides the defendant may redeem, and there are several other sections which so provide. Section 3128 is in these words: "The term 'defendant' as here used is intended to designate the party against whom, and the "plaintiff" the party in favor of whom any execution is issued." Now, as no judgment in the school fund foreclosure was rendered against Keefer, and the execution did not issue against him, but did issue against Dunlap & Upham, Casey

2. ____ : re-
demption: de-
fendant de-
fined. and the plaintiff, the latter, it is urged, may re-deem because he was defendant in execution. It

is clear, we think, the defendant contemplated in section 3102 of the Code is the mortgagor, because it is provided such defendant is entitled to possession during the period the right to redeem may be exercised. This can only mean the mortgagor or owner of the legal title subject to the mortgage. The sections of the Code following section 3102 in no manner enlarge the right therein given. Indeed, all the provisions of the statute refer, as we think, to the principal debtor and to his creditor. During the six months after

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the sale the right of the defendant to redeem is exclusive. Code, § 3103. This undoubtedly means the principal debtor. It cannot be successfully claimed, we think, a surety could redeem within the period above stated. During the next three months creditors may alone redeem. When such period expires the "defendant may still redeem at any time before the end of the year as aforesaid." The defendant then entitled to redeem is the same person contemplated in sections 3101 and 3102 of the Code. The term defendant, as used in section 3128, must therefore be construed to mean the principal debtor, or person who has the legal, or possibly an equitable, title in and to the premises sought to be redeemed. It is suggested the decree in the school fund foreclosure is blank as to the amount the plaintiff therein was entitled to recover. As we understand, such is not the fact, but that the case was presented to the court below as though it was, and as ____: it is insisted we therefore should regard the decree as being blank as to the amount recovered. The relief asked by the plaintiff, as we understand, solely related to the right to redeem. He does not ask to have the sale set aside, and by claiming the right to redeem he affirms the validity of the sale, and we hold he has no such right. This ends the controversy, and the judgment of the Circuit Court must be

AFFIRMED.

Marion v. C., R. I. & P. R. Co.

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4115 847
59 428
123 79

MARION v. C., R. I. & P. R. Co.

1. **Railroads: TORTS OF EMPLOYEE AS AFFECTED BY HIS PURPOSE.** The act of an employee of a railroad company in removing a trespasser from a train, cannot be considered the act of the company, unless he was employed generally to remove trespassers, or specifically to remove the particular trespasser. The question whether or not it was the *purpose* of the employee to serve his employer is relevant only in cases of willful injury done in the course of his employment.

Appeal from Jefferson District Court.

WEDNESDAY, OCTOBER 4.

ACTION to recover for a personal injury. The plaintiff avers in his petition that he climbed upon one of the defendant's freight trains while in motion; that he did so without a ticket and without the consent of the company; that one of the defendant's brakemen, in the course of his employment, negligently and willfully forced him from the train while in motion, and caused him to fall through a bridge, from which he received the injury complained of.

The defendant for answer denied all the allegations of the petition not admitted, and did not admit that one of its brakemen, in the course of his employment, negligently or willfully forced the plaintiff from the train. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Slagle & McCrackin and M. A. Low, for appellant.

McCoid & West, for appellee.

ADAMS, J.—There was evidence tending to show that the conductor was vested with the sole power to determine who should be allowed to ride upon the train and who should be removed therefrom. Upon this point the defendant asked the court to give an instruction in these words: "Acts done by an employee while engaged in the service of his employer

Marion v. C., R. I. & P. Co.

are not necessarily done in the course of his employment as the term is used in law, and if an employe, while engaged in the service of his principal to perform a special service, goes beyond or outside the scope of his employment, and in doing so injures one to whom, like the plaintiff in this case, the employer owes no duty, the employer is not liable." The court refused to give this instruction, and gave an instruction in these words: "Even though the instructions and rules of the company placed the matter of the removal of trespassers, or non-paying passengers, from the trains under the immediate charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because in this instance the brakeman acted without orders or direction from the conductor. But if the brakeman, not as a part of his duty as an employe of the defendant, but for the gratification of his own feelings, willfully or maliciously assaulted the plaintiff, and in this assault the plaintiff fell to the ground, then the defendant is not liable. The point you are to observe is this: that as the defendant owed the plaintiff no duty as a common carrier, therefore, unless the brakeman, as an employe of the company engaged in operating the train, acted for the purpose of putting him off and freeing the train from him as a trespasser, the defendant is not liable for this act." The giving of this instruction and the refusal to give the instruction asked are assigned as errors.

The rule is familiar that an employer is liable for the torts of an employe only where they are committed in the course of his employment. The difficulty has been to determine what acts should be deemed within the course of his employment. If in this case the conductor had forced the plaintiff from the train while in motion and while crossing a bridge, the act very clearly would, under the evidence, be deemed to be in the course of his employment, and that too even if it were shown that he had been expressly instructed to eject no

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person from the train when in motion, and especially when crossing a place as dangerous as a bridge. In one sense, the specific act would not be in the course of his employment, but his general employment to remove trespassers from the train would be sufficient to render the company liable.

But it appears to us that the act of an employe of a railroad company in removing a trespasser from a train cannot be considered the act of the company, unless he was engaged generally to remove trespassers, or specifically to remove the particular trespasser. The court below appears to have thought otherwise. The instruction given proceeds upon the theory that where a person is employed to do one thing, and he volunteers to do another, his act shall nevertheless be deemed to be within the scope of his employment *if his purpose was to serve his employer*. But in our opinion the purpose of the employe is not in a case like the one at bar material. The court, we think, was misled by a distinction which has been drawn by courts in a different class of cases. Where the question is as to whether the employer is liable for a willful injury done by an employe it is sometimes important to inquire whether the employe's purpose was to serve his employer by the willful act. *Illinois Central Railroad Co. v. Downey*, 18 Ill., 259; *Wright v. Wilcox*, 19 Wend., 343; *Moore v. Sanborn*, 2 Mich., 519; *Croft v. Alison*, 4 B & Ald., 590; *Johnson v. Barber*, 5 Gilman 425; *Foster v. Essex Bank*, 17 Mass., 479. The rule is that an employer is not liable for a willful injury done by an employe, though done while in the course of his employment, unless the employe's purpose was to serve his employer by the willful act. Where the employe is not acting within the course of his employment, the employer is not liable, even for the employe's negligence, and the mere purpose of the employe to serve his employer has no tendency to bring the act within the course of his employment. Where a female servant having authority to light fires in a house, but not to clean the chimneys, lit a fire for the sole purpose of cleaning a chimney, it was

Fuhs v. Osweiler.

held that her employer was not liable for an injury caused by her negligence in lighting the fire. *Mackenzie v. McLeod*, 10 Bing., 385. See, also, *Towanda Coal Co. v. Heenan*, 86 Pa. St., 418.

In our opinion the court erred in the instruction given and in refusing the instruction asked by the defendant. Several other questions are presented, but in the view which we have taken of the case they will probably not arise upon another trial.

REVERSED.

FUHS v. OSWEILER.

1. **Instruction: PETITION AND AMENDMENT.** Where in an action for slander there was a petition and an amendment thereto, in both of which slanderous words were charged, and the court in one of its instructions to the jury directed them that the plaintiff, in order to recover, must show that defendant did speak of her "one or more of the different forms or words charged in the *petition*," held that, if it were conceded that the word "petition" did not include the amendment, yet under the circumstances of this case (see opinion) the jury could not have been misled by the omission of the word "amendment," and that such omission was no ground for reversal.
2. **Verdict: EVIDENCE TO SUPPORT.** The evidence being conflicting this court will not reverse the judgment below on the ground that the verdict is not supported by the evidence.

Appeal from Keokuk District Court.

WEDNESDAY, OCTOBER 4.

THIS is an action for slander. The petition and amendment thereto allege in a large number of different forms of speech that the defendant said of the plaintiff that she stole corn. Among other defenses the defendant pleaded what was regarded by the court and the parties as a justification of the alleged slanderous utterances. There was a trial by jury and a judgment and verdict for the defendant. Plaintiff appeals.

Fuhs v. Osweller.

J. A. Donnel, for appellant.

Sampson & Brown, for appellee.

ROTHROCK, J.—I. The court in one of the instructions to the jury directed them that the plaintiff in order to recover must show that defendant did speak of her “one or more of the different forms of words charged in the *petition*.” It is claimed this instruction is erroneous because slanderous words were charged in the amendment to the petition as well as in the original petition.

We do not think this omission could have misled the jury. The court in other paragraphs of the charge recited the causes of action, including those set forth in the amendment to the petition, and it is very questionable, if this had not been done, whether it was error to omit the word “amendment” from the instruction complained of. In view of the fact that the widest range was taken in the testimony as to the slanderous words spoken, and this without objection, the jury would naturally be led to conclude that the slanderous words set out in the petition were those contained therein as amended at the time of the trial.

II. The evidence is all before us. The main question upon the trial is whether the words spoken by defendant were true. It is claimed that the verdict is so manifestly against the evidence as to require that it be set aside and a new trial awarded. We have carefully examined this question and have to say that there is a sharp, and it appears to us, irreconcilable, conflict in the evidence, which it was the peculiar province of the jury to determine, and which precludes this court from interfering. We need not set out or review the evidence. It is not our practice to do so where it is claimed a verdict or finding of facts is without support from the evidence.

AFFIRMED.

Bremner v. Hallowell.

BREMNER V. HALLOWELL ET AL.

1. **Justice of the Peace: CHANGE OF VENUE:** "NEXT NEAREST JUSTICE." When a justice of the peace grants a change of venue, he must send the papers to the "next nearest justice," and must designate by name who the next nearest justice is. Until he does this, he retains jurisdiction of the cause, and no other magistrate to whom the papers may be taken can acquire jurisdiction.

Appeal from Henry Circuit Court.

WEDNESDAY, OCTOBER 4.

ACTION on account before a justice of the peace; judgment for the plaintiff. Defendants sued out a writ of error and the Circuit Court set aside the judgment of the justice. The plaintiff appeals.

A. W. Kinkead, for appellant.

Clay B. Whitford, for appellee.

SEEVERS, CH. J.—We are only required to determine the questions certified to us by the circuit judge. We shall state the facts only as shown by the abstract which bear upon the single question determined. The action was commenced before justice Leedham. The defendants asked a change of venue, and the following order was thereupon made: "Change of venue is allowed and the papers and transcript sent to the next nearest justice of Center township." No determination was made as to who was the nearest justice. The papers were handed to a constable who took them to justice Jericho who was not the next nearest justice, but not finding him at his office, the papers were taken to the office of Mayor Drayer who was not the next nearest justice to Leedham. Drayer dismissed the case for want of jurisdiction, but granted leave to plaintiff to withdraw the papers from file, whereupon the papers were taken and filed before justice Whitford, who was the next nearest justice to Leedham. On application of

Bremner v. Hallowell.

plaintiff, Whitford granted a change of venue and ordered the papers sent to justice Jericho who rendered judgment for the plaintiff. We are asked: "Did Jericho acquire jurisdiction of the case and have the authority to hear the same." This question must be answered in the negative for the simple reason that Leedham never lost jurisdiction of the parties or subject-matter. When a change of venue is granted by a justice of the peace, it is his duty to send the papers to the next nearest justice. Code, § 3534. This of necessity requires the justice granting the change to designate by name who is the nearest justice. This is a judicial determination and in no other way can it be known who is the proper justice to whom the case has been transferred. *Tennis v. Anderson*, 55 Iowa, 625. Neither the constable nor any other person can determine who is the nearest justice. *Connell v. Steeson*, 33 Iowa, 147. Until Leedham determined and designated who was the nearest justice, the change of venue was not complete for the reason just stated, and that is, no one but the justice could determine such question. The cause, therefore, remained before Leedham. It is insisted the failure of the justice to designate who was the next nearest justice should not prejudice the plaintiff. But we think the parties should have seen that the required order was made which was necessary to complete the change. The proceedings before Drayer, Whitford and Jericho, are void for want of jurisdiction. It is unnecessary to determine the other questions certified.

AFFIRMED.

Murry v. Ocheltree.

MURRY, NELSON & CO. V. OCHELTREE ET AL.

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1. **Contract: ILLEGAL CONSIDERATION: GAMBLING "ON 'CHANGE.'** To invalidate a contract on the ground of the illegality of the transaction, it must be shown by a preponderance of the evidence that *both* parties participated in the intention which, if executed, renders the transaction illegal; therefore, *held* in this case (being a suit on a note given for losses incurred in trading in grain "options"), that although the *defendant* intended simply to gamble on the fluctuations of the markets, yet, since the evidence shows affirmatively that the transaction on the part of *plaintiffs* was a *bona fide* sale of grain to be actually delivered at a future time, they are entitled to recover.

Appeal from Louisa District Court.

WEDNESDAY, OCTOBER 4.

ACTION upon a promissory note executed by defendants to the plaintiffs. The case was tried to the court without a jury and judgment was rendered for defendants. Plaintiffs appeal.

Gray & Tucker, for appellant.

Newman & Blake, for appellee.

BECK, J.—I. As a defense to the action defendants plead "that plaintiffs were commission merchants in Chicago, Ill., and doing business for defendants in the sale of grain, and that plaintiffs dealt and traded in what is known as options "on change" in Chicago in grain, by selling and buying in market, "on change," certain grain for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold, or intended to be. That the whole business was a venture and speculation on "margins," depending for profits or losses on the fluctuations of the markets, and purely a fictitious and gambling transaction; that in such trade no consideration was received for money lost and paid, and when money was received nothing was paid therefor. And defendants say said note was given for loss

Murry v. Ocheltree.

in so trading in options, which plaintiffs well knew, and was therefore without consideration, in violation of law and contrary to public policy." This defense presents the sole issue in the case.

II. A transaction of the character alleged in the answer to be the consideration of the note in suit, is illegal, and is 1. CONTRACT: not a sufficient consideration to support a contract. illegal con-
sideration: But to invalidate a contract on the ground of the gambling on
change. illegality of the transaction, it must be shown by a preponderance of evidence that both parties bought or sold property with the knowledge and purpose that no actual delivery of the property, which was the subject of sale, should be made, or, in other words, that both participated in the intention which, if executed, renders the transaction illegal. If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property which is the subject of the sale, the transaction as to him will be valid and will be a sufficient consideration for a contract in his hands, based thereon. *Pixley v. Boyenton*, 79 Ill., 351.

III. The evidence in this case shows, without contradiction, that the transaction for which the note in suit was given was, on the part of plaintiffs, made in good faith with the purpose of delivering to defendants the grain which was the subject of the sale, and that they made actual purchases thereof with the intention of performing their contract of sale with defendants. Two of the plaintiffs testify positively and directly to this point. The defendants all unite in declaring that it was their purpose to make of the transaction an "option deal," but their testimony fails to disclose a like purpose on the part of plaintiffs. One of the defendants uses the following language in his testimony referring to the transaction: "I know this was an option deal simply because, so far as I was concerned, I never expected to receive any corn. I do not know whether or not plaintiffs bought the corn or not; I only meant for them to buy an option deal." The testimony of the other defendant is no stronger against plaint-

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iffs upon this point. No witnesses except the parties testified in the case. We may therefore declare that the testimony utterly fails to show that plaintiffs participated in any purpose which would invalidate the note, but, on the contrary, the transaction is affirmatively shown by the evidence to have been on the part of plaintiffs a *bona fide* sale of grain to be actually delivered at a future time. The judgment of the District Court, being without the support of any evidence, must be

REVERSED.

CITY OF WATERLOO V. UNION MILL CO. ET AL.

- 1. Cities and Towns: EFFECT OF PLATTING: RESERVATION FOR MILL-RACE: LIABILITY FOR BRIDGING.** The acknowledgement or recording of a town or city plat is equivalent to a deed in fee simple of such portion of the platted premises as are set apart for streets; and by the reservation, in such act, of the right to construct and use a mill-race across one of the streets included in the plat, the owners of the land platted simply retain an easement in such street; and when such race is constructed, they are bound to construct and keep in repair a bridge across the same where it cuts the street; and, when they neglect and refuse so to do, and the city repairs the bridge at its own expense, it may recover the same of the owners of the race.

Appeal from Black Hawk Circuit Court.

WEDNESDAY, OCTOBER 4.

THIS is an action in equity for the recovery of an amount expended in repairs of a certain bridge, and for a decree determining upon whom rests the obligation to keep the bridge in repair. The defendant, Black Hawk County, filed a demurrer to the petition which the court sustained. The defendant, the Union Mill Company, filed an answer and upon the trial the court dismissed the plaintiff's petition. The plaintiff appeals.

City of Waterloo v. Union Mill Co.

George Ordway and J. L. Husted, for appellant.

Alford & Gates, for the Union Mill Company.

M. L. Owens, for Black Hawk County.

DAY, J.—Upon the submission of the cause the following facts were agreed to: That June 24th, 1854, one Charles Mullan, being the owner of all the land hereinafter referred to, with others, platted the town of Waterloo, located on both sides of Cedar River, which runs southerly through the same. The portion of said land owned by said Mullan was bounded on the northeasterly side by Cedar River, on which, and adjacent to said plat, was a valuable mill site. Within said tract and bounded on three sides thereby, and on the other by Cedar River, was a tract about three hundred feet square not platted into streets and lots but designated on said plat as "Mill Square." On December 29th, 1856, A. C. Couch, R. W. Chapman and Thomas Jasylin were owners of the legal title of said mill square, and on that day, by George W. Couch, their attorney in fact, they in due form platted the same as an addition to Waterloo and duly acknowledged and recorded the plat. The plat shows Bridge street to be sixty feet wide, and running northeasterly from Commercial street to river. The dedication upon said plat by the owner of said property is as follows: "We * * * * who are the owners of mill square, hereby acknowledge the disposition thereof as set forth in the annexed plat to be in accordance with our wish and desire, signed this 29th day of December eighteen hundred and fifty-six, and hereby relinquish all our right to that part described, except the right to construct and use a race fifty feet wide across Bridge street and alleys." Soon after the recording of said plat of mill square there was erected, by voluntary subscription of the people of said town and vicinity, a bridge across Cedar River, about six hundred feet long, abutting on Bridge street as designated on said plat of mill square on the westerly side of

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said river, and on ground opposite the end of Fourth street—as designated on the original plat—on the easterly side of the river; and thereupon the proper officers of Waterloo township assumed control of said Bridge street and kept the same in repair, and the same was thereafter used as a public highway.

In the summer of 1860, proceedings were instituted for the establishment of a county road commencing at a point westerly from the westerly end of Fourth street, and running north-easterly along Fourth street to Commercial street; thence, northwesterly along Commercial street to the point of intersection with Bridge street; thence northeasterly along Bridge street and crossing Cedar River along the line of said bridge; and on September 3d, 1860, said county road was established in due form of law, extending over said Bridge street, but no claim for damages was made by the owners of Mill square on account of the establishment of said road, and no damage was ever paid such owners therefor. And thereupon said county of Black Hawk assumed control of said bridge over Cedar River and has since maintained and kept in repair a bridge at said point, except that the city of Waterloo contributed at one time a portion of the costs of building a new bridge across Cedar River. And since the establishment of said county road, said township of Waterloo, since its organization as such, assumed control of and has kept in repair said Bridge street, except the repairs on the bridge across the race hereinafter mentioned. Prior to 1866, George W. Couch, by several quitclaim deeds from parties who executed and acknowledged the plat aforesaid, acquired the legal title to said Mill square. June 6th, 1866, George W. Couch, for the consideration of \$3000, conveyed by warranty deed to Charles Blasberg, George P. Beck, and William Liede, a portion of the Mill square lying south-easterly of Bridge street, together with a part of the water-power adjoining said Mill square, which had, in 1854, been improved by a dam built across Cedar River northwesterly

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of said Bridge street, and was then, and prior, used to operate mills above said Bridge street. This deed conveys one-twelfth of the water-power created by the dam across Cedar River, to be taken on said premises from a race to be used in common with the other parties now, and who may hereafter become, interested in said water-power. The deed recites that the grantees are to be to one-twelfth of the expense of keeping said dam in repair, and one fourth of the expense of keeping said race in repair, and also one fourth the bridge over said race, and covering of said race when necessary. In the summer of 1866, Blasberg and the other grantee in said deed entered into possession of said land and erected thereon, southeasterly and below Bridge street a woolen mill, which was to be operated by water taken from the dam above Bridge street and carried through a race to be constructed from a point in the river above the dam across a portion of the Mill square and across Bridge street, to said woolen mill.

In the summer of 1867, said George W. Couch constructed the race aforesaid as contemplated, being at the point where it crosses Bridge street about fifty feet wide, and about ten feet deep, and the same has since been used to conduct water from the dam above said Bridge street to the mills below, and is now so used, and, unless bridged, is impassable and wholly prevents the use of said Bridge street as a public highway. In the construction of said race, Couch acted on his own motion, without soliciting or obtaining consent of any public authority, claiming that the reservation in the dedication of said Mill square plat authorized him to construct said race. The officers of Waterloo township and Black Hawk county knew of the construction of said race, and neither objected, nor by official action consented thereto. Before he had proceeded far enough to interfere with travel along the southeasterly side of Bridge street, Couch caused a temporary bridge to be thrown across on, or near, the north-easterly side of Bridge street, so as to enable the public to cross the same and, as soon as the said race was completed across

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said Bridge street, said Couch and Blasberg, and others, owners of said water-power, of their own accord, and at their own expense, constructed a substantial wooden bridge across said race within the boundaries of Bridge street, and built approaches thereto, which bridge was about fifty feet in width and about forty feet extending up and down said race. Couch contributed three-fourths, and Blasberg, Beck and Liede, one-fourth of the expense of building said bridge.

On the 29th day of September, 1867, George W. Couch, and Elwell, Hungerford, Manson & Bagg formed a co-partnership for the erection of a flouring mill, and the manufacture and sale of flour, and George W. Couch deeded to Elwell, Hungerford, Manson and Baggs, an undivided four-fifths of a portion of said premises, the deed reciting that said parties are jointly to stand and be in relation to said property in the same condition in the ownership as Couch stood in before the execution of the deed, and that the firm assumed the responsibility of Couch in the maintenance of the dam and repair of the same as well as the race. Soon after the construction of said race, George W. Couch, with others, adopted articles of incorporation of the Waterloo Mill Company, and thereafter said Elwell and others conveyed to said corporation certain lands on Mill square below Bridge street, and said corporation in 1869 or 1870 built thereon a flouring mill, and used the water-power drawn through said race to operate said mill. This deed contains the following recitals;

"It being understood, and this deed is accepted by said Waterloo Mill Company, subject to all the rights, conditions, stipulations and reservations, with reference to said water-power and the rebuilding and repair of the same, as the said grantors are entitled or subject to, said Waterloo Mill Company standing in place of said grantors and assuming all the responsibilities of said grantors in relation to the repairing, rebuilding and maintaining said dam and race." From the time of the construction of said race till the 18th day of June, 1873, Couch and Blasberg and others, and the Waterloo

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Mill Company kept said bridge so built over said race in repair. On the 18th day of June, 1873, the Waterloo Mill Company conveyed said Mill property to the Union Mill Company, a corporation, which went into possession of said property under said deed, and has ever since used and enjoyed and operated said mill with water drawn through said race across Bridge street. The deed to the Union Mill Company contains the same recital as that contained in the deed to the Waterloo Mill Company. Afterward, the Union Mill Company by several quitclaim deeds became invested with the interest of Blasberg, Liede and Beck, subject to all the conditions, restrictions and reservations contained in the deed under which they acquired their title. At the time of the making of the repairs by the city, and at the commencement of this action, the Union Mill Company was the owner of all the mill property lying southeasterly of and below Bridge street, and was using water taken through said race, and held the same under the deeds above mentioned.

As soon as the plat of Mill square was made and recorded, the public accepted and assumed control of said Bridge street, and the same was improved and kept in repair thereafter by the proper officers of Waterloo township, and after the incorporation of said city, the same, except the said bridge across said race, was kept in repair by the proper officers of said city. The entire travel across Cedar River, which divided said city into two nearly equal parts, crosses said river across said bridge and Bridge street. The evidence shows that in October, 1879, the bridge across the mill race was in an unsafe condition and in need of repairs, and the city of Waterloo caused a notice to be served upon the Union Mill Company that the bridge was unsafe, and a demand that they put it in a safe condition. The Union Mill Company failed to repair the bridge, and in 1880, the city of Waterloo repaired it at a cost of \$138.75, and in April, 1880, demanded that amount of the Union Mill Company.

I. The acknowledgment and recording of the town plat

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was equivalent to a deed in fee simple of such portions of the premises platted as were set apart on the plat for streets. Code, § 561. By the reservation of the right to construct a race across Bridge street, the owners of the land platted retained an easement in said street, the fee in which passed from them by the acknowledging and recording of the plat. By the retaining of a mere easement, the owners of the land can in no sense be regarded as having greater rights in the street than the owner of lands over which a highway is laid out and constructed, who still retains the fee in the soil, subject to a mere easement in the public.

The law is well established that the owner of lands over which a highway is established, who constructs a mill race across the highway, is bound to erect and maintain a bridge across the race at his own expense. See *Dygest v. Schenck*, 23 Wend., 445; *Perley v. Chandler*, 6 Mass., 454; *City of Lowell v. Proprietors of Locks and Canals*, 104 Mass., 18; *Heacock et al. v. Sherman*, 14 Wend., 59; *Phœnixville v. Phœnix Iron Co.*, 45 Pa. St., 135. For reasons equally potent, the parties constructing the race in question in this case, are bound to construct and keep in repair a bridge across the same.

II. There is another ground of decision which leads to the same conclusion. It is conceded by the appellee that the reservation of the owners of the land of the right to construct a race across Bridge street is to be construed precisely the same as though the city of Waterloo, owning the fee in the street, had granted to the defendant the Union Mill Company, the privilege of constructing a race across the street.

That a reservation should be construed in the same way as a grant by the owner of the soil of a like privilege, see *French v. Cahart*, 1 Comst., 96 (103). Nothing passes as an incident to a grant of an easement but what is requisite to its fair and reasonable enjoyment. *Amondson v. Severson*, 37 Iowa, 602 (606). Now it is not essential to the enjoyment of a grant of the right to cut a mill race across a street,

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that the grantee should be allowed to leave the street severed in two parts. The street may be united by means of a bridge, and it is not at all inconsistent with the full enjoyment of the easement that the grantee should be required to restore the street, as nearly as possible, to its former condition, by the construction and maintenance of a bridge across it. *In re The Trenton Water-Power Company*, 20 N. J., 659, where a private corporation was authorized by its charter to construct a canal, and the company cut the same across a public highway, rendering a bridge necessary where none was required before, it was held that the company must construct and maintain such bridge. The reasoning of this case is fully applicable to the case at bar. The plaintiff, in our opinion, is entitled to recover of the defendant, the Union Mill Company, the amount expended in repairs of the bridge in question.

REVERSED.

HOLLEN V. DAVIS ET AL.

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103 336
- 59 444
21 498
1. **Promissory Note: BLANK AS TO AMOUNT: NOT GOOD IN LAW.** The figures on the margin or at the head of a note are no part of it, but a mere memorandum; and there can be no recovery at law on a note which fails to state in the body of it the amount for which it is given.
 2. **Practice: APPEAL FROM JUSTICE'S COURT: AMENDMENT OF PETITION.** Where a judgment was obtained before a justice of the peace on a note on which there could be no legal recovery, it was error for the Circuit Court on appeal to allow plaintiff, against defendant's objections, to amend his petition, by setting up a mistake in the execution of the note, and asking equitable relief in the reformation of the instrument. To do so was a violation of section 3591 of the Code, which provides that on appeal "no new demand or counter-claim can be introduced into a case after it comes into the Circuit Court, unless by consent."

Appeal from Tama Circuit Court

THURSDAY, OCTOBER 5.

ACTION upon a promissory note originally commenced before a justice of the peace where a judgment was rendered for plaintiff; on appeal by defendants to the Circuit Court a like

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judgment was rendered and defendants now appeal to this court. The facts of the case appear in the opinion.

Stivers & Louthan and *C. B. Bradshaw*, for appellants.

Struble & Kinne and *O. H. Mills*, for appellee.

BECK, J.—I. This action was brought before a justice of the peace upon a promissory note indorsed to plaintiff in the following form and language:

"\$200.00. TAMA CITY, Iowa, July 27th, 1875.

"Fifteen months after date I promise to pay to the order of Richard Thomas, and in case of his death to J. D. Merritt, _____ dollars, at the Banking House of Carmichael, Brooks & Co., for value received, with interest at ten per cent per annum. "FRED T. DAVIS."

“Due October 27th, 1876.

The defendant Davis, the maker of the note, accepted service of the notice of the action before the justice, and assented "that the justice have jurisdiction to try the suit to the amount of two hundred and fifty dollars."

The defendant failed to appear to the action before the justice and judgment was rendered against him by default for two hundred and fifty dollars and costs. From this judgment defendant appealed to the Circuit Court.

By leave of the Circuit Court, defendant filed an answer and counter-claim, and afterwards plaintiff, by leave of the court, filed what is called an amended petition, setting out the note and showing that it was transferred to plaintiff who is now the holder thereof, and alleging that the amount for which the note was intended to be executed, two hundred dollars, is not expressed in the body of the note, being omitted through mistake in failing to fill up the blank, and that it was the mutual agreement and understanding of the parties that the note should be so written as to express the agreement to pay two hundred dollars. The amended petition prays that the note may be reformed and corrected by inserting the words "two hundred" in the body of the note in the proper

Hollen v. Davis.

blank, and that judgment for the sum of \$350 be rendered in this case.

A motion to strike the amended petition on the ground that it presents a cause of action in equity, and no such claim was made before the justice, was sustained. Thereupon the cause came on for trial and plaintiff offered the note in evidence. Objection thereto on the ground that the instrument is not a promissory note, is not described in the notice of the action of the justice's court, and does not contain a promise to pay any sum of money, was overruled, and the note was admitted. The defendant thereupon withdrew his counter-claim.

The plaintiff testified, in substance, it was the intention of the parties that the note should call for \$200, and the proper words expressing that amount were not written through oversight and mistake. This evidence was objected to by defendant. The plaintiff was permitted to file an amended petition which is in the same language as the amended petition stricken from the files. To the filing of the pleading objection was made on the ground that it introduces a new demand in the action which is exclusively cognizable in a court of equity. The objections were overruled and the cause was continued at the costs of defendants. At the next term the defendants moved to strike the amended petition for substantially the same reasons that were assigned as objections to filing it. The motion was overruled. Upon evidence showing it was the intention of the parties that the note should call for \$200, judgment was entered reforming it to correspond with such intention, and judgment was rendered against defendant and his sureties upon the appeal bond for \$327.38. The sureties upon the appeal bond unite with defendant in the appeal.

II. The figures in the margin of the note in the suit are no part of the instrument; they constitute a mere memorandum. They cannot supply the blank for insertion of the amount the maker agreed to pay.
1. PROMISSORY
note: blank as
to amount: not
good in law.

Norwich Bank v. Hyde, 13 Conn., 297; *Smith v. Smith*, 1 R. I., 398.

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It follows that there can be no recovery upon the note, for it is not a promise to pay any sum. This conclusion seemed to have been reached at the trial in the court below, for recovery was only had after judgment reforming the instrument and filling the blank in accord with the intention of the parties as shown by the evidence.

III. We are required to determine whether the Circuit Court was authorized to enter the decree reforming the note.

2. PRACTICE: It cannot be denied that relief of this character ^{appeal from justice's court;} can be granted only in chancery. No such relief ^{amendment of petition.} could have been granted by the justice of the peace, for he had no jurisdiction of matters solely cognizable in chancery. Constitution, Art. 11, § 1; Code, § 3508.

Code, section 3591, provides that in appeal cases "no new demand or counter-claim can be introduced into a case after it comes into the Circuit Court, unless by mutual consent." The word "demand" here used means "a claim; a legal obligation." It relates to the subject of the suit and the remedy sought. These are presented in action by the pleadings, and issues are thus formed involving them. The claim made before the justice and the remedy sought cannot be changed and issues involving other matters presented in the Circuit Court upon appeal. In the case before us the subject of the action in the justice's court was a claim for \$200 upon a promissory note. The instrument sued upon was found upon appeal not to be a promissory note, for it bound the maker to pay no sum of money. The amended petition asked the court to reform the note and render judgment thereon. It is plain that the remedy thus sought is not the same that plaintiff asked in the justice's court. Not only does he ask that the court shall make, as it were, a new instrument, but render judgment thereon. It is equally plain that the subject of the suit is changed by the amendment. It becomes thereby a claim upon a note different from the one in suit before the justice. The reformation changed the note from an invalid instrument by which the maker was bound to pay no sum of money, into a

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valid one calling for \$200. The form, substance and effect of the note are changed by the reformation. It in fact becomes a new and different instrument.

It is apparent that the issues involved in the amendment are not those which were presented to the justice. See *Dicks v. Hatch*, 10 Iowa, 380; *Griswold v. Bowman et al*, 40 Id., 367.

We reach the conclusion that the Circuit Court erred in reforming the note and rendering judgment thereon.

REVERSED.

MINNESOTA LINSEED OIL CO. V. MONTAGUE & SMITH.

1. **Pleading: MOTION TO STRIKE PART OF ANSWER.** Where plaintiff alleged that defendants were to pay out certain moneys deposited with them on the order of one V., plaintiff's agent, for *flax seed* only, and defendants for answer alleged that they were authorized to pay out the money on V's order pertaining to the business of his agency *without restriction*, it is plain that, under the contract set up by defendants, they were authorized to pay V., upon his order, sums actually due him as commissions upon his purchases, and an allegation in the answer that there was a sum actually due V., and that defendants paid the same, was proper, and the court properly refused to strike it out on plaintiff's motion.
2. **Evidence: PAROL TO PROVE CONTENTS OF WRITING.** Before parol testimony can be admitted to prove the contents of a written memorandum, it must be shown that the writing itself could not have been introduced.
3. **—: LETTERS OF INSTRUCTION.** It was error for the court to exclude letters offered by plaintiff, which had been written by plaintiff's officers to defendants, and which tended to support plaintiff's claim that defendants had been instructed to pay out plaintiff's money for flax seed only, that being the very ground on which plaintiff sought to recover.
4. **Agent: ACQUIESCE IN ACTS OF: REASONABLE TIME TO OBJECT.** It was error for the court to instruct the jury as to what constituted a reasonable time within which plaintiff was required to object to the acts of his agent, in order to avoid being bound thereby; that question should have been submitted to the jury.

Minnesota Linseed Oil Co. v. Montague & Smith.

Appeal from Cerro Gordo District Court.

THURSDAY, OCTOBER 5.

ACTION AT LAW. The pleadings and facts of the case are fully set out in the opinion. There was a judgment upon a verdict for defendants, plaintiff appeals.

Blythe & Merkley, for appellants.

Wilbur & Sherwin, for appellees.

BECK, J.—I. As a question in the case involves the pleadings, it becomes necessary to set them out fully. The material parts of the petition allege:

"That on or about the first day of August, 1879, plaintiff by and through their managing agent, J. E. Harkness, made and entered into a parol agreement with defendants, whereby defendants were to receive and keep on deposit the various sums of money which plaintiff might from time to time send them, for the purchase of flax seed, and that the same should be paid out only upon the certified tickets of J. H. Valentine, issued by him only for the purchase of flax seed. That at said date, defendants orally agreed and promised plaintiff that said money should be kept by them on deposit, and should not be paid out or used for any other purpose, except for the purchase price of flax seed that should be purchased by J. H. Valentine for plaintiff, and then to be paid out only upon tickets furnished by plaintiff, properly filled out, which tickets should show weight, gross pounds, sacks, number, net weight, bushels, gross, deductions, foreign substances, light weight, total bushels deducted and net bushels, price paid and total amount paid for, quantity purchased, less note and interest, payable at Cerro Gordo County Bank, dated and signed by J. H. Valentine, agent; that in pursuance of said agreement plaintiff furnished defendants at various times large sums of money for the purchase of flax seed, which sums in the aggregate amounted to the sum of \$5,402.04;

Minnesota Linseed Oil Co. v. Montague & Smith.

that defendants failed and neglected to pay out said money as agreed, but wrongfully and contrary to said agreement paid out at different times a large amount of said money, to-wit: the sum of \$401.47, to J. H. Valentine, not for flax seed but for pretended commissions, which said amount was paid out by defendants as follows, to-wit:

October 14, 1879, to J. H. Valentine.....	\$233.36
February 12, 1880, to J. H. Valentine.....	120.05
April 1, 1880, to J. H. Valentine.....	48.06
Total.....	\$401.47

"That the above sums were paid out by defendants contrary to agreement, and not paid for flax seed, but for pretended commissions, as above stated."

The answer is in the following language:

"Defendants deny that it was agreed that said money should be paid out only on the purchase of flax seed by said Valentine, and on certified tickets issued by him for the purchase of flax seed, nor for the purchase of flax seed only, and deny that plaintiff deposited with defendants more than \$5,000 under said contract, deny that defendants failed to pay out said money as agreed, and deny that the same was paid contrary to the agreement between plaintiff and defendants; that said sum of \$5,000 was deposited with defendants, under a parol agreement that defendants would pay out the same on the drafts and orders of plaintiff's agent, J. H. Valentine, and in and about his employment, as agent of plaintiff in the purchase of flax seed, and to-wit:

"On the first day of January, 1880, there became due said Valentine from plaintiff, as commission on flax seed, purchased by him for plaintiff, the said sum of \$401.47, which the defendants afterwards, and as the disbursing agents of the plaintiff, paid to said Valentine, as they lawfully might, and afterward on the second day of April, 1880, defendants remitted to plaintiff the sum of \$332.88, balance remaining in their hands, with full statement of their doings in the

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business, and without any complaint or objection from plaintiff until the commencement of this suit."

A motion made by plaintiff to strike from the answer the words indicated above by italics was overruled.

Subsequently the defendants amended their answer by adding thereto the following averments: "Defendants state that on making to plaintiff the statement mentioned in the answer, plaintiff failed to object thereto in a reasonable time, and thereby ratified and approved the same."

II. The ruling of the court in refusing to strike a part of defendants' answer is now complained of by plaintiff. We think the ruling correct.

The petition alleges a contract under which defendants received money of plaintiff to be paid out for flax seed only.

1. PLEADING: The answer denies this contract and sets up a motion to strike part of different one upon which defendants received the answer. money under which they were authorized to pay it out upon drafts and orders of Valentine, plaintiff's agent, which pertained to matters connected with his employment. The difference in the contracts pleaded by the respective parties is this, plaintiff alleges that the defendant was to pay the money on Valentine's order for flax seed only; defendants allege that they were authorized to pay upon his orders pertaining to the business of the agency without restriction. It is plain that under the contract set up by defendants, they were authorized to pay Valentine, upon his order, sums actually due him as commissions upon his purchases. In support of defendants' authority to pay Valentine for commissions under the contract pleaded by them, it was proper to allege and show that there was a sum actually due him. Such an allegation is presented by the words assailed by the motion. It was correctly overruled.

III. The plaintiff offered to prove by a witness the contents of a certain written memorandum of instruction given by their agent, Harkness, to defendant, touching 2. EVIDENCE: parol to prove contents of writing. the payment of the money upon orders drawn by Valentine. This evidence was properly excluded

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for the reason there was no foundation laid for the introduction of parol proof of the contents of the writing. It was not shown that the writing itself could not have been introduced in evidence.

IV. The plaintiff offered in evidence certain letters written by the proper officers of plaintiff to the defendants, which 3. ____ ; letters of instruction. covered remittances and contained directions which, plaintiff claims, restricted defendants to payment of orders by Valentine drawn for the purchase of flax seed. These letters were, we think, erroneously excluded. They surely tended to support the claim of plaintiff that defendants were notified and instructed that Valentine was authorized to draw only for the payment of flax seed purchased, and that he could not draw for commissions due him. We are very clear in the opinion that the letters ought to have been admitted in evidence.

V. The tenth instruction given to the jury contains the following directions:

"Before a principal will be held to ratify the unauthorized act of an agent, it should appear that a full knowlengle of 4. AGENT: ac- what has been done by the agent has come home quiescence in acts of: rea- to the principal; and in such a case the neglect sonable time to object. to object by the principal for an unreasonable time after such knowledge, would be held a ratification. If the plaintiff was notified in April of the acts of defendant, and made no complaint until in August following, and knew during the time which intervened of the acts of defendants, such delay, without complaint under such circumstances, would be unreasonable, and it would conclude the plaintiff; and it (the plaintiff), would be held that defendants' acts were approved, even though they may not have been in accord with the original authority."

This instruction we think incorrect. The question involving what constituted a reasonable time within which plaintiff was required to object to defendants payment, should have been submitted to the jury. It is a question of fact to be determined by the jury upon the evidence.

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Kramph's Ex'r v. Hatz's Ex'r, 52 Pa. St., 525; *O'Brien v. Phænix Insurance Co.*, 76 N. Y., 459; *Parkhill v. Imlay*, 15 Wend., 431; *Porter v. Patterson*, 15 Pa. St., 229; *Wilder v. Sprague*, 50 Me., 354; *Magee v. Carmack*, 15 Ill., 289; *Davis v. Kinaga*, 51 Ill., 170.

Other instructions given to the jury we think are correct. An objection involving the misbehaviour of the jury, upon which we are not entirely agreed, need not be considered, as it will not arise upon a second trial.

For the errors above pointed out the judgment of the District Court must be

REVERSED.

SHELLY V. SMITH ET AL.

1. **Execution: EXEMPTION: MONEY DUE FROM BOARDERS.** The money due from boarders for board to a boarding-house keeper who rents a house for such business, furnishes for the use of the boarders the proper chambers, kitchen, dining-room and other furniture, buys materials for food and has them cooked, employs servants for cooking, waiting upon the table, taking care of the chambers and other purposes, and pays such servants therefor; who assists in and oversees the work about the house, and charges the boarders a stated sum per month, in a lump, for the entire board and lodging thus furnished, is *not* exempt from execution as earnings for personal services, under section 3074 of the Code.

Appeal from Lee Circuit Court.

THURSDAY, OCTOBER 5.

THIS is a proceeding of garnishment upon execution from a justice's court. D. B. and Marianda Smith intervened and claimed that the amounts garnished were exempt as personal earnings within ninety days. The justice rendered judgment in favor of plaintiff against the garnishees. Upon appeal the Circuit Court held that the garnished funds were exempt. The plaintiff appeals. The facts are stated in the opinion.

Shelly v. Smith.

Anderson Bros. and Davis, for appellants.

D. N. Sprague, for appellees.

DAY, J.—The cause was tried to the court, and the facts were found as follows:

“1. Plaintiff recovered a judgment against defendants, about the 27th of September, 1881, for the sum of \$100 and costs, on which execution issued about the 27th of October, 1881, and Howard Tucker, George Rix and Frank Warren were garnished, and upon answer by Warren that he owed defendant for board, September, 1881, \$20; October, 1881, \$20; and by Tucker that he owed for October, \$54; and by Rix that he owed for October, \$40; a judgment was rendered against the garnishees.

“2. That D. B. Smith is the husband of Marianda Smith and the head of a family.

“3. That Marianda Smith keeps a private boarding-house, and had twelve boarders at the time said three above named boarders were garnished, who paid her at that time in the aggregate \$244, per month.

“4. That she had no capital in the begining, but borrowed \$25, and used her ordinary household and kitchen furniture in the business.

“5. That she devoted her time to the business, and her daughter assisted her, and besides she employs a cook, a chamber-maid, a waiter and a boy.

“6. That all the money due from the boarders, other than those garnished, has been collected and paid out for supplies purchased on credit.

“7. That the services of Marianda Smith are worth \$100 per month in said business, and that of her daughter \$30 per month, and that they both devoted their time and services during the time the money garnished was earned, and are both members of the family of D. B. Smith. The money due plaintiff is not for supplies.”

The court found as a matter of law that the fund garnished

Shelly v. Smith.

was exempt from execution, for that it was the personal earnings of defendant and his family for work, labor and services performed within ninety days immediately preceding the garnishment. The judge certified that the case involves the determination of a question of law upon which it is desirable to have the opinion of this court, as follows: "Whether the money due from boarders for board to a boarding-house keeper, who rents a house for such business, furnishes for the use of the boarders the proper chamber, kitchen, dining-room and other furniture, buys materials for food and has them cooked, employs servants for cooking, waiting upon the table, taking care of the chambers, and other purposes, and pays such servants therefor; who assist in and oversees the work about the house, and charges the boarders a stated sum per month, in a lump, for the entire board and lodging thus furnished, is exempt from execution as earnings for personal services under section 3074 of the Code of 1873."

Section 3074, of the Code is as follows:

"The earnings of said debtor for his personal services, or those of his family at any time within ninety days next preceding the levy are also exempt from execution and attachment."

The object of this statute, we think, is to exempt the earnings for personal service, as contradistinguished from the income arising from a business involving other elements of gain than the mere personal services of those conducting it. It is evident that the business of keeping a boarding-house involves many elements of profit, aside from the mere personal earnings of the proprietor and of his family. It involves compensation for the use of the premises, including their value and location, the profits upon the raw material employed, and the general character of the establishment. If the proprietor of such a boarding-house could hold his personal earnings and those of his family exempt from execution whilst employed about the general business, no reason can be assigned why the proprietor of a hotel, or a bank, or

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of a mercantile establishment may not do the same. In all such employments, as well as in many others which might be named, the gross income may be made up very largely of the personal earnings of the proprietor, and the members of his family. To apply the exemption of the statute to such cases, would, we think, extend its application entirely beyond what was intended by the legislature.

The appellee relies upon *Brown v. Hebard*, 20 Wis., 326; and *Banks v. Rodenback*, 54 Iowa, 695. Neither of these cases go far enough to exempt the fund in controversy in this case. The cases of *Hubner v. Chave*, 5 Penn. St., 115, and *Smith v. Brooks*, 49 Id., 147, have some bearing upon this question.

The court erred in holding the fund in question exempt.

REVERSED.

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BARNES v. BARNES.

1. **Divorce: ALIMONY TO PARTY IN FAULT.** Alimony is rarely, and only under peculiar circumstances, granted to the party in fault, even when that party is the wife: and, in this case, where the husband was in fault, he being about fifty-eight years old, able-bodied and able to support himself, and having already carried away from the homestead about \$400 worth of property, it was error to grant him \$300 alimony and make it a lien on the homestead, which consisted of forty acres of land bought and improved with the wife's money, held in her name, and worth about \$1,600. The order allowing the husband \$25 as temporary alimony to pay attorney's fees will be permitted to stand, but no lien upon the homestead will be allowed therefor.

Appeal from Lee District Court.

THURSDAY, OCTOBER 5.

THE plaintiff commenced an action for divorce from his wife, the defendant, on the ground of cruel and inhuman treatment. The defendant denied the allegations of the petition and filed a cross-petition claiming a divorce from the plaintiff on the ground of cruel and inhuman treatment, desertion

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and habitual drunkenness. Pending the trial the court made an order that the defendant pay into court for the use of the plaintiff, to pay his attorney, \$25. This sum was not paid. Upon the final hearing the court found against the plaintiff on his petition, and in favor of the defendant on her cross-petition, and that she is entitled to a divorce from the plaintiff.

The court further found that the plaintiff is entitled to alimony in the sum of three hundred dollars, which is to include fifty dollars as plaintiff's attorney's fees, which fifty dollars includes the twenty-five dollars allowed as temporary alimony, and decreed that said sum of three hundred dollars be a lien upon forty acres of land owned by the defendant and which the parties occupied as a homestead. From these orders respecting alimony the defendant appeals.

J. F. Smith, for appellant.

F. H. Sample, for appellee.

DAY, J.—The parties were married in Virginia in 1851, where they resided until 1872, when they removed to Lee county Iowa. They brought with them of their joint means about \$385, which was used in the support of their family. Prior to their coming to this State the defendant inherited \$1,800 from the estate of her father, with a part of which the parties purchased forty acres of land upon which they have since resided as a homestead, paying therefor \$1,400 and taking the title in the wife's name. This property has been somewhat improved, and is now worth about \$1,600.

All the improvements have been paid for with the wife's money, with the exception of a little ditching and clearing the property of weeds, which was done by the personal labor of the plaintiff.

The plaintiff is in the habit of becoming intoxicated. In the summer of 1877, the plaintiff refused to work the premises, and procured employment elsewhere.

In the fall of that year the plaintiff left the defendant, and has not lived with her as her husband since. At the time

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of the trial the plaintiff was about fifty-eight years of age, and the defendant about fifty-six. The plaintiff is an able bodied man, and when sober, is industrious, and able to support himself. The parties have several children, all of whom have attained their majority, except one daughter, who lives with her mother, and was fourteen years of age at the time of the trial. When plaintiff went away he took most of the personal property upon the place, consisting of three horses and a colt, three cows, eight head of hogs, wagon, plows, and a harrow, of the value of about \$400.

In granting the plaintiff permanent alimony under the circumstances of this case we think the court erred. Alimony is rarely and only under peculiar circumstances granted to the party in fault, even when that party is the wife. The property out of which alimony was allowed in this case was entirely purchased with the money of the wife, and we are satisfied from the evidence that the plaintiff by his labor contributed to its value only in a small degree, and that contribution arose principally out of the proper husbandry of the premises, in their annual cultivation.

Whatever permanent improvements were placed upon the land were paid for out of the wife's money. The whole premises are now worth less than the sum which the defendant received from her father's estate. The defendant has no sons who owe her service, and has a daughter dependent upon her. The imposition of a lien of \$300 upon the homestead in her present circumstances would certainly embarrass her, and might result in the loss of her homestead. The plaintiff, upon the other hand, if he remains sober, can easily provide for his own support. As illustrative of the general rule that permanent alimony will not be awarded the party in fault, see *Shafer v. Shafer*, 6 N. W. Rep., 768. The order allowing the plaintiff twenty-five dollars as temporary alimony for the payment of attorney's fees will be permitted to stand, but no lien upon the homestead will be allowed therefor. In all other respects the judgment respecting alimony is.

REVERSED.

Porter v. Dalhoff.

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PORTER v. DALHOFF & CO. ET AL.

1. **Venue:** ACTION FOR SPECIFIC PERSONAL PROPERTY: STATUTES CONSTRUED. An action for specific personal property may be brought, under section 3225 of the Code, in any county in which the property or some part thereof is situated; and when such an action was dismissed as to the defendant residing in the county in which the action was begun and the property situated, the other defendants, who resided in another county, were not entitled to have it dismissed as to them. Section 2587 of the Code, does not apply to such a case, but only to actions purely personal.

Appeal from Decatur District Court.

THURSDAY, OCTOBER 5.

PLAINTIFF commenced this action in detinue to recover a stock of goods, and for damages for the unlawful detention of the same. R. M. Sylvester, deputy sheriff, and Dalhoff & Co. were made defendants, and it appears from the petition that Sylvester levied an execution upon the goods, in a case in which Dalhoff & Co. were plaintiffs in execution, and a partnership named Porter & Porter were defendants.

The defendants appeared and Sylvester demurred to the petition on the ground that it did not show that any written notice of ownership had been served on him by plaintiff before suit brought, and on the further ground that a levy upon the goods by a deputy sheriff did not make him liable to the action, but that, if there was any liability, it was against the sheriff.

The first ground of demurrer was confessed, and leave was taken to amend the petition. The second ground of demurrer was sustained, and the defendant Sylvester was discharged.

Thereupon, the defendants Dalhoff & Co., moved the court for a change of the place of trial on the ground that they had been sued in the wrong county. A showing was made that they were residents of Des Moines county. The motion was overruled. On the same day plaintiff amended his petition

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and asked that the cause be continued for service upon A. J. Allen, sheriff. A continuance was ordered to which Dalhoff & Co. objected and excepted. The sheriff answered admitting the service of a written notice on a Saturday evening and averring that he released the goods to the plaintiff on the Monday following. He also averred that Dalhoff & Co. had a valid judgment upon which the levy of execution was made, and that the title to the goods was in Porter & Porter, and they were subject to the execution, and asking for the return of the goods to him and for possession of the same.

The defendants, Dalhoff & Co., averred in substance the same as the answer of the sheriff.

There was a trial by jury and a verdict for the plaintiff, awarding him the goods and damages in the sum of \$20. It was further found that Allen, the sheriff, returned the goods to the plaintiff within a reasonable time after the service of the written notice on him. Thereupon, the court, on motion of Allen, discharged him, and held that he was not liable in damages and costs. The defendants, Dalhoff & Co., then moved the court to dismiss the action as to them and allow them compensation for attending court in a county other than their residence. The ground of the motion was that, as they were sued jointly with Allen who is a resident of Decatur county, and no judgment was obtained against Allen, there could be no judgment against them. The motion was overruled and judgment was rendered against them for the damages and costs, and they appeal.

Hammack, Howard & Virgin, for appellants.

E. W. Haskett, for appellee.

ROTHROCK, J.—This is an action for specific personal property, and under section 3225 of the Code "it may be brought in any county in which the property, or some part thereof, is situated." The venue is not limited to the county of the residence of the defendant. The defendants Dalhoff & Co.

Brown v. Davidson.

were required to either disclaim any interest or claim to the property or defend the action in the county where it was situated. They were not entitled to a change of the place of trial.

By their answer they contested the ownership and right of possession of the property, and they had no right to a dismissal after verdict against them because Allen was released. Section 2587 of the Code, upon which appellants rely, has no application to a case like this. That section refers to actions which are purely personal.

AFFIRMED.

BROWN v. DAVIDSON.

1. Habeas Corpus: COMMITMENT FOR CONTEMPT BY INSANE HOSPITAL VISITING BOARD. As no power is conferred upon the visiting committee of an insane hospital, either by special or general provision of the Code, to punish for a contempt, such committee cannot exercise such power, and the plaintiff, who was restrained of his liberty upon the order of such committee, for refusing to testify before it, was properly discharged on writ of *habeas corpus*.

Appeal from order of Judge of Henry Circuit Court.

THURSDAY, OCTOBER 5.

The plaintiff presented to the Judge of Henry Circuit Court a petition for a writ of *habeas corpus*, alleging that he was unlawfully restrained of his liberty by J. R. Davidson, sheriff of Henry county, in the county jail of said county. A writ of *habeas corpus* was duly issued to said sheriff to which he made return and answer substantially as follows:

"That said Brown is now held by me as sheriff of Henry county, Iowa, by virtue of a writ of process issued and directed by the visiting committee of the Iowa Hospital for the Insane.

Brown v. Davidson.

"That the writ of commitment was issued and served on the said Brown on July 27th, at or near the hour of 4 o'clock, P. M. of said day, and at a time for the adjournment of said board until the next day, and said board did adjourn until the next day; that said board, or visiting committee, was in session at the city of Mt. Pleasant, Iowa, where one of the hospitals for the insane of Iowa is located; that the said board were at the time in the investigation of whether the inmates of said hospital are and have been by the present officers of said hospital humanely and kindly treated, and for the purpose to correct any abuses found to exist at and in said hospital.

"That said board, or visiting committee, had been advised that said Brown before mentioned had knowledge and possessed facts pertinent to and touching the matters under investigation by said board, as before and above alleged.

"That for said purposes aforesaid, the said Brown was, July 27, 1881, duly and regularly subpoenaed to be in attendance before said board there visiting for said purposes, and to there appear forthwith; that said Brown failed to obey said subpoena, whereupon an attachment was issued by said committee for said Brown, on which he was arrested and taken before said committee to testify, as aforesaid.

"That the said Brown was then and there notified of the purpose for which he was arrested and taken before said committee, and was asked to be sworn as a witness to testify to such facts as were within his knowledge touching said matters then under investigation; but the said Brown failed and willfully refused to be sworn or testify to any fact within his knowledge touching said matters, and, giving no reason or excuse therefor, he was by said committee adjudged in contempt, and by said committee ordered committed, as shown by the warrant of commitment, which was duly signed by the committee."

To this return and answer the plaintiff demurred. The demurrer was sustained, and the defendant refusing to answer farther, the petitioner was discharged. The defendant appeals.

Brown v. Davidson.

Smith McPherson, Attorney-general, for appellant.

*D. P. Stubb*s, for appellee.

DAY, J.—The question involved in this case pertains to the power of the visiting committee provided for by section 1435 of the Code to punish for a contempt. This section provides for a visiting committee of three, one of whom at least shall be a woman, to be appointed by the governor, who may visit the insane asylum of the State at their discretion, and, upon such visit, go through the wards unaccompanied by any officer of the institution, with power to send for persons and papers, and to examine witnesses on oath, to ascertain whether any of the inmates are improperly detained in the hospital, or unjustly placed there, and whether the inmates are humanely treated, with full power to correct any abuses found to exist. Section 3491 of the Code confers general authority upon the courts of this State, and, upon any judicial officer acting in the discharge of an official duty, to punish for contempts.

Other provision of the statute confers upon certain officers not judicial, specific power to punish for contempts. See Code, §§ 14, 16, 356, 2820, 3145, and 3680.

No specific power is conferred upon the visiting committee authorized in section 1435 of the Code to punish for a contempt. Such power is not conferred by the general provisions of section 3491, for, whilst the visiting committee may exercise quasi judicial powers, they are not a court nor judicial officers acting in the discharge of official duty.

As no power is conferred upon the visiting committee, either by specific or general provision of the Code, to punish for a contempt, we are of the opinion that they cannot exercise such power. Upon this subject see *Rutherford v. Holmes*, 66 N. Y., 368; *Watson v. Nelson*, 69 Id., 536; *Noyes v. Byzbee*, 45 Conn., 382.

AFFIRMED.

Eggert v. White.

EGGEERT & THOREN v. WHITE ET AL.

1. **Chattel mortgage: RECOVERY OF PROPERTY UNDER.** One who seeks by virtue of a chattel mortgage to recover the possession of property which he claims is covered by it, must rely on the strength of his own title and not on the weakness of the title of his adversary.
2. **—: INSUFFICIENT DESCRIPTION: PAROL EVIDENCE TO AID.** The description of the property in the mortgage was as follows: "All and the entire crop of flax and wheat and other grain or produce *raised* on the east half, etc.,," and the year when the same were to be "raised," was not stated; *held* insufficient to put defendants on inquiry as to crops, none of which were "raised," and only five acres of which were sown, at the time of the execution of the mortgage, and that the description could not be aided by parol testimony.

Appeal from Hardin District Court.

THURSDAY, OCTOBER 5.

THE defendant, White, commenced an action to foreclose a mortgage executed to him by one Griggs, on certain real estate. The defendant, Miller, on the application of White, was appointed a receiver to take charge of certain crops growing on the mortgaged premises. The plaintiffs intervened in said action, claiming they were entitled to the possession of said crops under a chattel mortgage executed to them. The receiver took possession of the crops harvested, sold the same, and paid the net proceeds to White. From the order appointing the receiver there was an appeal, and the same was reversed by this court. See 54 Iowa, 650. The object of this action is to recover the value of the crops as converted by the receiver. The court held the plaintiffs could not recover, and they appeal.

J. H. Scales, for appellant.

M. W. Anderson and H. L. Huff, for appellee.

Eggert v. White.

SIEVERS, CH. J.—I. The right of the plaintiff to recover is based on the chattel mortgage executed by Griggs. In addition to a general denial, several special defenses were pleaded. The general denial put in issue the sufficiency of the mortgage. If the plaintiffs did not have a valid and sufficient mortgage on the crops, they cannot recover, no matter whether the defendants had any title or right thereto. The plaintiff must recover on the case made in the petition and on the strength of his own title, and not on the weakness of the defendants' title. If the plaintiffs are not entitled to recover, the defendants are liable to the true owner of the property. It is said by counsel for the plaintiffs that the defendants are trespassers, and therefore not in a position to question the validity of the mortgage. In support of such proposition *Harlem v. Lockwood*, 37 Conn., 500, is cited. This case has no application to the case in hand, nor does it support the proposition stated by counsel. Unless the plaintiffs were the owners, or in possession of the property, they cannot say the defendants were trespassers.

II. The description of the property in the mortgage is as follows: “All and the entire crop of flax and wheat and other grain or produce raised on the east half, etc.” The evidence tended to show the grain in controversy consisted of wheat and flax, and that about five acres thereof were sown at the time the mortgage was executed. The mortgage does not describe or refer to crops growing at the time it was executed, but to crops “raised.” The description is indefinite and uncertain in that it does not appear when the crops were “raised.” If, however, the mortgage can be said to describe and apply to growing crops, then the description is insufficient, because the year the same are to be grown is not stated. *Pennington v. Jones*, 57 Iowa, 37. The plaintiff sought by parol to identify the property mortgaged. It is said it has been held this may be done when the property consists of horses or cattle. *Smith v. McLean*,

Boyle v. Wilcox.

24 Iowa, 322; *Yant v. Harvey*, 55 Iowa, 421. Conceding the rule to be as claimed, it must of necessity have its limits. For instance, if the property was described as a white horse and there were no other marks of identification, it must be regarded as doubtful whether it could be shown by parol the horse mortgaged was black. But the true question here is whether the description in the mortgage was sufficient to put the defendants on an inquiry. If it was not, then what the parties may have intended, or what could be shown by parol, is wholly immaterial. We think the description of the property was insufficient to put the defendants on inquiry.

AFFIRMED.

BOYLE V. WILCOX ET AL.

1. **Appeal: FROM JUSTICE'S COURT: AMOUNT IN CONTROVERSY.** Where plaintiff sued in justice's court on an account of \$32.15, but admitted payments to the amount of \$12, and the defendants for answer denied all indebtedness and pleaded payments to the amount of \$29, but asked for no judgment, held that defendants' pleading was a defense simply, and not a counter-claim; that the amount in controversy was not greater than the amount of plaintiff's claim, to-wit, \$20.15; and that the Circuit Court should have dismissed the case on appeal, on defendants' motion, for want of jurisdiction—the amount in controversy being less than \$25.

Appeal from Hardin Circuit Court.

THURSDAY, OCTOBER 5.

ACTION upon an account brought before a justice of the peace. The account sued on was for \$32.15, but the plaintiff admitted payments to the amount of \$12.00 and asked judgment only for the balance, \$20.15. The defendants for answer denied all indebtedness and pleaded payments to the amount of \$29.00. This plea of payments they called a counter-claim. The plaintiff recovered judgment before the

Boyle v. Wilcox.

justice for \$3.70. She appealed to the Circuit Court, and recovered judgment for \$20.15. Before the trial in the Circuit Court the defendant moved to dismiss on the ground that the amount in controversy was less than \$25.00. The court overruled the motion, and from the order overruling the motion the defendants appeal to this court.

Albrook & Hardin, for appellant.

H. L. Huff, for appellee.

ADAMS, J.—This case comes to us upon a certificate duly presenting the question as to the correctness of the ruling of the court upon the defendants' motion to dismiss. The difficulty appears to arise solely out of the difference in views which are taken of the defendants' pleading. The plaintiff's view seems to be that the defendants not only deny that there was ever anything due the plaintiff on the alleged account, but aver that there is due from her to them the sum of \$29.00 for money advanced to her by them. But we do not think that this view can be sustained. It is true that the payments pleaded are called a counter-claim. But, if the money advanced was advanced as payments, such payments become merely a matter of defense. The defendants did not claim that they had overpaid, or advanced money as payments by mistake, nor did they ask for any judgment. The controversy between the parties appears to be this: The plaintiff admitted payments to the amount of \$12.00; the defendants claimed payments to the amount of \$29.00. The amount in controversy, we think, was not greater than the amount of the plaintiff's claim, \$20.15, and it follows that the defendants' motion to dismiss should have been sustained.

REVERSED.

State v. Blunt.

59	468
102	655
59	468
124	413

STATE v. BLUNT.

1. **Criminal Law: misconduct of district attorney.** If it were admitted to be true, as alleged, that on the trial for an assault with intent to commit rape, the district attorney pointed out the defendant to the prosecutrix before she identified him as the person who made the assault upon her, this court is not prepared to say that such misconduct would be sufficient ground for reversing the judgment of conviction. It would weaken the testimony of the prosecutrix on the point of identification, but of that the jury could judge.
2. **—: alibi: testimony to prove.** The court instructed the jury as follows: "It is recognized in the law that the defense of *alibi* is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution;" held correct in law and properly given in this case.

Appeal from Floyd District Court.

THURSDAY, OCTOBER 5.

THE defendant was tried in the court below under an indictment for an assault with intent to commit a rape, and was convicted. He appeals.

J. S. Root, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. When the complainant was on the stand as a witness, she identified the defendant as the person who committed the assault upon her. It is claimed that the judgment should be reversed because the district attorney, before the witness, answered the question whether she could see defendant in the court room, pointed him out to her. Affidavits have been submitted on both sides as to what occurred at that time, and, if that which is certified by the court and sworn to by others on the part of the State is true, there was no improper action by the district attorney. Even if he did point out the defendant to the witness, we are not prepared to say that the judgment should be reversed for that reason. Of course, the testimony of the witness as to the identity of

State v. Blunt

the defendant would be very much weakened by such conduct on the part of the prosecutor, but of that the jury could judge.

II. The evidence, which, by a suspension of the rule, has been submitted to us upon the transcript, is somewhat voluminous. We have read and examined it with care, and, without detailing the facts sworn to by the witnesses, will say that in our opinion there is no escape from the conclusion that the defendant committed an outrageous assault upon the prosecutrix.

III. The defendant relied upon an *alibi* as his defense. The court, in its instructions to the jury, after properly explaining this defense and the rules of law governing it, stated that: "It is recognized in the law that the defense of *alibi* is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution." It is urged that this instruction is erroneous.

We think the court in giving the caution did no more than was proper. That the proposition is correct there can be no doubt. It accords with the observation of every one of experience in criminal tribunals. Besides, there can be no prejudice in cautioning the jury to closely and carefully scan the proof in every case. In this case, in the very same connection, the court advised the jury that a charge of this crime is one easily made, hard to be proved, but still harder to be defended, even by the innocent, and they should not "suffer their indignant feelings to control or influence their judgment when considering such cases, but they should bring to the consideration of the evidence in the case their cool, deliberate, dispassionate judgment alone."

Taking these instructions together, there was no prejudice to the defendant in them. They do not state incorrect propositions of law, and have no tendency to show any bias in the learned judge who tried the case, either for or against the defendant. We find no error in the record.

AFFIRMED.

REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT
DUBUQUE, OCTOBER TERM, A. D. 1882.

IN THE THIRTY-SIXTH YEAR OF THE STATE.

PRESENT:

HON. WILLIAM H. SEEVERS, CHIEF JUSTICE.
" JAMES G. DAY,
" JAMES H. ROTHROCK, } JUDGES.
" JOSEPH M. BECK,
" AUSTIN ADAMS,

STATE v. TATMAN.

59 471
684 230

1. **Criminal Law: TWICE IN JEOPARDY: ADJOURNMENT OF COURT PENDING TRIAL.** While it is a general rule that a person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been impaneled and sworn, yet to this general rule there are many exceptions; and in this case, being a trial for forgery, when, after all the evidence had been introduced, the presiding judge was called home by telegram on account of the illness of his wife, and he thereupon adjourned the court and discharged the jury until the following Friday, and on the following Friday he by telegram

State v. Tatman.

ordered the court to be finally adjourned, and on the next Monday his wife died; *held* that the emergency justified the adjournment of the court; that the defendant had not been in legal jeopardy, and was properly put on trial on the same indictment at a subsequent term of the court.

2. —————: PRACTICE: COMMENTS ON DEFENDANT'S TESTIMONY. Where the defendant offered himself as a witness and testified on his own behalf, it was not a violation of section 3636 of the Code for the district attorney, in his argument to the jury, to comment on the fact that the defendant had testified to a part only of his defense, and had omitted to testify upon other material facts in the case within his knowledge, and to urge that such omission should be considered by the jury.

Appeal from Adair District Court.

TUESDAY, OCTOBER 17.

THIS is a prosecution under an indictment for the crime of uttering a forged deed. There was a trial by jury and defendant was convicted, and he appeals.

J. W. West, for appellant.

Smith McPherson, Attorney-general, for the State.

ROTHROCK, J.—I. The defendant was put upon trial at the March term, 1880. After all the evidence had been introduced, the presiding judge received a telegram

1. CRIMINAL law : twice in from his home at Des Moines, to the effect that jeopardy: ad-
court pend-
trial home. This was on the 9th day of March, 1880.

The court was adjourned until the following Friday, and the jury were discharged until that time, and the judge went to his home. On Friday, the judge by a telegram ordered the court to be finally adjourned, and on the Monday following his wife died.

At the March term, 1881, of said court, the defendant was again put upon trial upon the indictment. He filed a written plea setting out the facts, and alleging that legal jeopardy had attached and that he could not again be put upon trial upon the indictment. The cause was submitted to a jury

State v. Tatman.

upon this issue, and a verdict was found to the effect that the defendant was not entitled to an acquittal upon that ground.

It is provided by the constitution of this State that "no person shall, after acquittal, be tried for the same offense." It is urged that the facts above cited amounted in law to an acquittal, or, what is the same thing, being once in jeopardy. "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn." Cooley's Const. Lim., 325.

While this is the general rule, there are many exceptions to it in the common law. If, by any overruling necessity, the jury are discharged without a verdict, as from the sickness or death of the judge holding the court, or of a juror, or the inability of the jury to agree on a verdict, or if the term of the court as fixed by law comes to an end before the trial is finished, or if the jury are discharged with the consent of the defendant, or a new trial be granted, the defendant may again be put upon trial upon the same indictment. Most of these exceptions are provided for by statute in this State. Code, §§ 4443-4; 4455-6-7-9. And in *State v. Redman*, 17 Iowa, 329, it was held that when a verdict is insufficient and defective in not responding to the indictment, the court may set it aside and try the prisoner again on the same indictment. In the *State v. Calendine*, 8 Iowa, 288, when the name of a material witness upon the part of the State was not indorsed on the indictment, he not having been before the grand jury, and objection being made to his testimony, the court dismissed the indictment, and ordered the prisoner to be held to bail, and another indictment was found, it was held that the defendant could not again be put upon trial. In that case it is said that "it is not at all times within the discretion of the court to stop the prosecution, and still hold the accused to answer to the same offense on a future charge. It may discharge the jury under peculiar circumstances, in

State v. Tatman.

cases of necessity, as upon a sudden indisposition of a witness, a juror, or the court, or a final difference of opinion among the jurors; for, over circumstances of this nature, neither the court, the attorney nor the parties, have any control." An examination of other cases, which will be readily found from the text books, will show that the rule above stated has been in its substance approved by every court where this matter has been under consideration.

The question as to the emergency upon which the court was adjourned in this case was tried in the court below, and it was found that the court was justified in making the adjournment. Of course, it must not be understood that the rule requires that an actual necessity should exist for the discharge of the jury. If that were to be the test, then, in case of the sickness of the judge or a juror, the defendant might object that the sickness was so slight as not to absolutely require that the trial be stopped. Something must be left to the discretion of the court. If the discretion be not abused, the defendant has no cause of complaint.

We think that in the case at bar the discretion of the judge in determining there was sufficient cause to adjourn the term was wisely exercised. To hold otherwise would be to establish a rule that a defendant in a criminal case has the right to require that a judge shall proceed with the trial while his wife is dying at his home. The law makes no such inhuman requirements. A judge under such circumstances would be as unfit to proceed with the trial of a case as he would be if laboring under a severe fit of sickness. If, under these circumstances, we were to order the absolute discharge of the defendant, it would justly strike the profession as an act not required by, but subversive of, the ends of public justice.

II. Upon the final trial on the plea of not guilty the defendant offered himself as a witness, and he was examined as
2. ____ : pro- to certain matters material to his defense. The
tice : com- district attorney in his argument to the jury
ment on de- defendant's tes- commented upon the fact that the defendant tes-
timony. tified to a part only of his defense, and omitted to testify

State v. Tatman.

upon other material facts in the case within his knowledge, and urged that such omission should be considered by the jury.

It is contended that because of this conduct of the district attorney the judgment should be reversed. Section 3636 of Miller's Code provides that defendants in criminal proceedings shall be competent witnesses in their own behalf, but, if a defendant should elect not to become a witness, that fact shall not have any weight against him on the trial, and shall not be referred to by counsel for the State, and if counsel should do so, defendant shall be entitled to a new trial.

It is conceded that it was the right of the district attorney to comment on such testimony as the defendant gave, but it is urged that he had no right to comment upon the defendant's failure to testify as to matters regarding which he preferred to keep his mouth closed.

The exemption from unfavorable comment extends only to such defendants as choose not to avail themselves of the privilege of testifying in their own behalf. Here the defendant put himself upon the stand as a witness, and we can see no reason why the counsel for the State should not comment on his testimony as fully as on that of any other witness. By putting himself upon the stand and testifying to material facts in his defense, the defendant waived the protection which the statute accords to him. See Cooley's Const. Lim., 317 and note.

AFFIRMED.

Woods v. Haviland.

59 476
114 354

WOODS V. HAVILAND ET AL.

1. **Execution from Justice's Court: LIMIT AS TO TIME OF ISSUING: STATUTE CONSTRUED.** Where a judgment was rendered in a justice's court in December, 1868, less than five years prior to the taking effect of the Code of 1873, and execution was issued thereon in 1877, held that the execution was properly issued and was valid; for, although section 3911 of the Revision, which was in force when the judgment was rendered, provided that in such cases execution should not issue after five years from the entry of the judgment, yet, as the five years had not elapsed when section 3569 of the Code took effect, that section became the law applicable to the case, and extended the time for the issuance of the execution to ten years after the date of the judgment.

Appeal from Marshall District Court.

TUESDAY, OCTOBER 17.

ACTION IN EQUITY. Decree for the plaintiff and defendants appeal.

Sears & Stone, for appellant.

Brown & Carney, for appellee.

SEEVERS, Ch. J.—This cause was submitted to the District Court, and is submitted to this court on an agreed statement of facts. On the 4th day of December, 1868, a judgment was rendered by a justice of the peace against L. E. B. Holt et al., and an execution was issued thereon in 1877, under and by virtue of which the plaintiff was garnished as the supposed debtor of the execution debtors. It is agreed by counsel, if the execution was invalid, judgment should be rendered for the plaintiff, but, if valid, the defendants were entitled to judgment. The District Court found the execution was invalid and rendered judgment accordingly.

The Revision was in force when the judgment was rendered, and it is therein provided that executions for the enforcement of judgments rendered by a justice of the peace may be issued "at any time within five years from the entry of the judgment, but not afterward." Rev. § 3911.

Woods v. Haviland.

The Code took effect in September, 1873. At that time, the time within which an execution could issue under the Revision, had not expired. Section 3569 of the Code extends the time for issuing executions on judgments rendered by a justice of the peace to ten years from the rendition of the judgment. When the execution in question was issued, the right to do so under the Code existed, but was barred under the Revision. The statutes above referred to partake and are in the nature of statutes of limitation. It may be safely stated, we think, that such statutes relate to the remedy, and, unless it is otherwise provided, the new statute will ordinarily apply to existing causes of action. *Higgins v. Mendenhall*, 42 Iowa, 575; *Brodt v. Rohkar*, 48 Id., 36; *Smith v. Momson*, 22 Pick., 430; *Pleasants et al. v. Rohner*, 17 Wis., 595; *Winston v. McCormack*, 1 Ind., 56; *Gilman v. Cutts*, 28 N. H., 376.

The question, then, is, whether there is a statute which controls the operation of section 3569 of the Code, so that the provisions thereof do not apply to judgments rendered under the Revision.

It is provided by statute: "All public and general statutes passed prior to the present session of the General Assembly, and all public and special acts, the subjects whereof are revised in this Code, or repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed. This repeal of existing statutes shall not affect any act done, any right accruing, or which has accrued or been established," * *. Code §§ 47, 50.

The statutory provisions contained in the Revision in relation to the issuance of executions on judgments rendered by a justice of the peace are of a general and public nature, and were revised by the Code, and, therefore, repealed thereby, unless a right was accruing, or had accrued, thereunder. We have, then, to inquire, what is the extent or character of the right thus preserved.

It is quite clear that an accruing or accrued vested right

Woods v. Haviland.

is within the statute. But such a right cannot be constitutionally abrogated or substantially affected by the General Assembly. It is therefore difficult to say it is such only that is preserved from the operation of the repealing statute enacted as a part of the Code. No such provision was required to protect a vested or contract right.

To us it seems clear that the accruing and accrued rights are and must be of the same character. There is no other distinction made by the statute except that one has accrued and the other is accruing. The statute takes effect upon both, and both are preserved to the party entitled thereto. This being so, we will suppose the five years had expired, during which an execution could issue under the Revision, when the Code took effect. No execution could issue under the Code, because the right was barred when it took effect. The right, therefore, had accrued. But if such right was simply accruing, it was not affected by the repeal of the prior statutes, but as such right related to the remedy only, and was existing when the Code took effect, the time within which an execution could be issued was thereby extended to the period of ten years from the rendition of the judgment. It seems to us there is no escape from this conclusion, and we think it has been substantially so held in *Du Boise, McGovern & Co. v. Bloom*, 38 Iowa, 512, and *McDonald v. Jackson*, 55 Id., 37.

The facts in *Gray v. Iliff*, 30 Id., 195, are like those in the case before us. The decision, however, was placed on other grounds. The point under consideration does not seem to have been made by counsel, at least it is not alluded to by the court. The right in *Schmidt v. Holtz*, 44 Iowa, 446, was held to be a "substantial right which became a part of the contract." This is not claimed in the present case. Being of the opinion the execution was properly issued and was valid, the judgment must be

REVERSED.

State v. Lillard.

STATE V. LILLARD.

1. **Indictment: LARCENY.** An indictment for larceny was as follows: "The grand jury of the county of Decatur, in the name, and by the authority of the State of Iowa, accuse the defendant, D. P. Lillard, of the crime of larceny, committed as follows: The said defendant, D. P. Lillard, on the ninth day of September, 1879, in the county aforesaid, one mare," etc.—held good as against the objection that it did not charge that any crime was committed in the State of Iowa.
2. **Larceny : EVIDENCE CONSIDERED.** Upon consideration of the evidence in this case, it was held sufficient to support the verdict of guilty.
3. ——: **VENUE.** In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods.

Appeal from Decatur Circuit Court.

TUESDAY, OCTOBER, 17.

THE defendant was convicted of the larceny of a mare and sentenced to the penitentiary for one year. He appeals.

Harvey & Young, for appellant.

Smith McPherson, Attorney-general, for the State.

DAY, J.—I. It is urged that the indictment does not charge that any crime was committed in the State of Iowa. The <sup>1. INDICT-
MENT : lar-
ceny.</sup> indictment is in the following form: "The Grand Jury of the county of Decatur, in the name, and by the authority of the State of Iowa, accuse the defendant, D. P. Lillard of the crime of larceny committed as follows: The said defendant, D. P. Lillard, on the 9th day of September, 1879, in the county aforesaid one mare," etc. This indictment is exactly in the language of section 4297 of the Code, with the exception that the word *aforesaid* is used instead of the words *as aforesaid*. It is urged by appellant that this variance is material, and that because of it there is no statement that Decatur county is in the State of Iowa. In our opinion this position is not tenable. That this indictment

State v. Lillard.

would have been good, under section 4651 of the Revision, see *State v. Winstrand*, 37 Iowa, 110. There is no material difference between section 4651 of the Revision and 4297 of the Code of 1873.

II. It is claimed that the evidence does not support the verdict. The animal in question was owned by one D. M.

^{2. LARCENY:} Chase. The evidence clearly shows that she was ~~evidence con-~~ stolen. She was running on the range, and was last seen by the owner near the line between Clarke and Decatur counties, on the 4th day of September, 1879. The owner missed her on the 9th day of September. Before noon on the 5th day of September, the defendant came to the livery stable of J. L. Brown, in Osceola, Clarke county, riding a horse and leading the mare in question. He fed the horses at Brown's stable, and about four o'clock of the same day he proposed to trade the mare to Brown, and told him he had worked her once. Brown traded for the mare. About the 28th of September, the defendant came back and traded for the mare and took her away. The defendant resided about two miles from Chase and knew the mare. On the 9th day of September, when Chase missed the mare, the defendant told him that he had seen the mare but twice, but would know her, and that he knew nothing about her. The defendant said he would help hunt the mare. In about a month Chase learned that the mare was at Gardener's, in Clarke county, and went to the defendant and described the mare to him. He then said the mare was at Gardener's, and took his team and went with Chase to Gardener's and showed him the mare. On the way up to Gardener's the defendant said he had had the mare and that he came honestly by her: that he had bought the mare from a man that stopped at Daniel's place to water, who said he was going to Garden Grove to sell her. These circumstances fully sustain the verdict.

The defendant knew the mare. He had her in his possession and traded her off the day after she was stolen, saying he had worked her. A few days after, he denied knowing any-

Morgan v. Miller.

thing about her, and afterward admitted that he had had her in his possession and claimed that he bought her of a stranger. No explanation of these circumstances is offered. They point to the defendant as the guilty party, and in the absence of explanation warrant his conviction.

III. The point mainly relied upon is, that there is no proof that the larceny was committed in Decatur county. The ~~a — : ven-~~ mare, when last seen before the larceny, was on the prarie, in Clarke county, about three fourths of a mile from the Decatur county line. The evidence shows that the defendant lived in Decatur county, and that he admitted that he had had the mare there at his place. In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods. 1 Wharton Criminal Law, § 284; 2 Id., § 1815.

The record discloses no error.

AFFIRMED.

MORGAN ET AL V. MILLER.

1. **Highway: ESTABLISHMENT OF: REPORT OF COMMISSIONER AGAINST: INJUNCTION.** Where, under section 832 of the Revision, the commissioner appointed to examine and report upon the establishment of a highway reported against it *held*, that the board of supervisors had no further jurisdiction of the matter, and that their action in attempting to establish the road was void: *also*, that where, as in this case, there was a threatened invasion of the rights of plaintiffs by the road supervisor in opening the pretended road, plaintiffs might anticipate the injury and prevent it by injunction.

59	481
36	389
59	481
92	125
59	481
97	363

Appeal from Marshall Circuit Court.

TUESDAY, OCTOBER 17.

ACTION for an injunction to restrain the defendant, as road supervisor, from opening an alleged county road. An in-

Morgan v. Miller.

junction was granted in favor of one of the plaintiffs, B. F. C. Everist, and on final hearing was made perpetual. The defendant appeals.

J. M. Parker, for appellant.

Henderson & Carney, for appellee.

ADAMS, J.—The county road in question was declared established in January, 1868. The appellee insists, however, that it was not in fact established, because the commissioner appointed to examine and report upon the same reported against it. He insists that under the statute the board had no further jurisdiction of the matter, and that their action in attempting to establish the road was void.

It appears to us that the plaintiff's position in this respect is correct. The statute then in force provided that, where the commissioner appointed to examine and report upon a road reports against the road, no further proceedings shall be had thereon. Rev., § 832. A report against the road was made a final determination. The application was no longer pending.

The appellant insists, however, that the appellee is not entitled to an injunction, because it does not appear that there has been any threatened invasion of his rights, and, even if there had been, an action for an injunction would not lie.

As to the threatened invasion, we have to say that we think it is clearly enough shown by the evidence, taken in connection with the answer. The appellant in his answer avers in substance that he was ordered by the board of supervisors to work the road, and that he has a right to do so, because the same is a legally established road. The evidence shows that two of the appellee's co-plaintiffs were notified by the appellant to remove their fences; which notice could have been given only with the view of opening the road. We think that the appellee had reasonable ground to believe that the appellant, unless enjoined, would open the road.

Clay v. Richardson.

Upon the question as to whether an action for an injunction will lie, even if the threats are shown, it is contended by the appellant that the case does not differ from an ordinary threatened trespass, and especially if there is in fact no road. But it appears to us that it does.

The defendant is a public officer, and is ordered by the board of supervisors to open the road as an official act. Certain action has been had by the board and spread upon the record, by reason of which the board and the defendant claim the right to open the road. Under the circumstances, we think the appellee is not bound to wait until his fences have been thrown down and his fields thrown open and a right of action has accrued to him at law. It is his right to have determined in advance whether the pretenses of the appellant and the board of supervisors have any valid foundation, in order that he may govern himself accordingly. We think that the decree of the Circuit Court is correct.

AFFIRMED.

CLAY v. RICHARDSON ET UX.

1. **Homestead: INCUMBRANCE OF.** Where the plaintiff sought to enforce a lien against defendant's homestead, based upon a parol agreement of the wife, who held the legal title, to execute a mortgage on the property, *held* that the petition was properly dismissed, since, under Code, section 1990, no incumbrance of the homestead is of any validity unless it be based upon a written instrument signed by both husband and wife.

59	483
122	402
59	483
135	442

Appeal from Hardin Circuit Court.

TUESDAY, OCTOBER 17.

ACTION in chancery to enforce the specific performance of an oral contract to execute a mortgage upon defendants' homestead in security for money loaned them by plaintiff. Upon answer of defendants, the bill was dismissed on motion. Plaintiff appeals.

Clay v. Richardson.

Tom H. Milner, for appellant.

S. M. Weaver, for appellee.

BECK, J.—It is alleged in the petition that defendants who, are husband and wife, own a homestead of the value of \$2,000, which was sold upon a special execution issued upon a decree subjecting it to debts of the husband. The title of the homestead, the petition shows, is in the wife, who borrowed of plaintiff \$596 to redeem the property from the sale on execution, undertaking orally, with her husband, to execute a mortgage upon the homestead securing the money borrowed, which they have failed and refused to do. The petition prays that defendants be required to specifically perform their agreement to execute the mortgage, and, in case they fail to do so, that judgment be rendered for the amount borrowed of plaintiff with interest, and that it be a lien upon the homestead. The defendants deny that the money was borrowed to redeem the homestead from the execution sale, and also deny the allegations of the petition setting up the agreement of defendant to execute a mortgage on the property.

After the answer was filed, defendants moved the court to dismiss plaintiff's petition on the ground, substantially, that it presented no facts entitling plaintiffs to equitable relief. The motion was correctly sustained.

The petition seeks to enforce a lien against defendant's homestead based upon a parol agreement to execute a mortgage upon the property. But an incumbrance of the homestead is of no validity unless it be based upon a written instrument signed by both husband and wife. Code, § 1990. *Clark v. Evarts*, 46 Iowa, 248; *Barnett v. Mendenhall*, 42 Iowa, 296. The petition upon its face shows that plaintiff is not entitled to equitable relief. The Circuit Court rightly dismissed it.

AFFIRMED.

Cerro Gordo County v. Wright County.

CERRO GORDO COUNTY v. WRIGHT COUNTY.

1. Practice in Supreme Court: MOTION TO DISMISS APPEAL. The appellant having in this case shown by affidavit that the grounds on which was based a motion to dismiss the appeal are not true, *held* that the motion must be overruled.
2. Jurisdiction: EXCLUSIVE IN CIRCUIT COURT: ACTION FOR SUPPORT OF NON-RESIDENT PAUPER. Under section 1359 of the Code, the Circuit Court has exclusive jurisdiction of proceedings by one county against another to recover for money expended in support of a pauper whose legal residence was in the latter county.
3. ——: PRACTICE IN SUPREME COURT. Consent of parties cannot confer jurisdiction over the subject-matter of an action; and the objection that the court below had no jurisdiction may be raised for the first time in this court.

Appeal from Franklin District Court.

TUESDAY, OCTOBER 17.

THE plaintiff, claiming it had furnished support to a poor person who had a legal settlement in the defendant county, commenced this proceeding to recover the amount thus expended. Trial by jury, verdict and judgment for the plaintiff. The defendant appeals.

Nagle & Weber, for appellant.

Kellam, King & Henly, for appellee.

SEEVERS, CH. J.—The motion to dismiss the appeal must be overruled, because the appellant shows by an affidavit the ground upon which the motion is based is not true. This is a special proceeding commenced in the Circuit Court of Wright county, under and in the manner provided in section 1359 of the Code. The plaintiff moved the court to change the place of trial, on the ground that Wright county was defendant in the action. The motion was sustained, and, by consent of the parties, the case was sent to the District Court of Hardin county.

59	485
87	555
59	485
89	408
59	485
112	516
59	485
117	148

Cerro Gordo County v. Wright County.

That the Circuit Court, under section 1359 of the Code, had exclusive jurisdiction of the subject-matter must, we think, be conceded. This being so, it follows of course the District Court did not have jurisdiction. This point is now urged by counsel for the appellant for the first time, and it is insisted, as the District Court had no jurisdiction, its judgment must be set aside.

It is undoubtedly true that consent of the parties cannot give a court jurisdiction over the subject-matter of an action.

^{8. — : practice in supreme court.} *Walters v. The Steamboat Mollie Dozier*, 24 Iowa, 192; *Walker v. Kynett*, 32 Id., 524. The

case first cited also holds the jurisdictional question may be raised for the first time in the Supreme Court; and in *Groves v. Richmond et al.*, 53 Id., 570, this court on its own motion took notice of and determined such question. It therefore follows, the judgment of the District Court must be reversed, although we find no error other than that above stated in the record. The cause will be remanded to the Circuit Court of Wright county where the error first occurred. *Ferguson v. Davis County*, 51 Id., 220.

REVERSED.

York v. Ferner.

YORK v. FERNER, ADM'R

1. **Husband and Wife: ANTE-NUPTIAL CONTRACT AVOIDED BY WIFE'S DELINQUENCY.** Where a woman brought an action against the administrator of her deceased husband to recover an annuity provided in an ante-nuptial contract, and it appeared that she abandoned her husband seven weeks and three days after the marriage, on account of his becoming intoxicated, a habit which he had fully developed and of which she was fully aware when the contract was consummated, *held* that she could not recover, and that her petition was properly dismissed.

59	487
4110	502
59	487
137	300

Appeal from Story Circuit Court.

WEDNESDAY, OCTOBER 18.

ACTION by equitable proceedings to enforce an ante-nuptial contract between plaintiff and her deceased husband, defendant's intestate, and to recover an annuity secured by it. The plaintiff's petition was dismissed by the Circuit Court, and she now appeals to this court.

J. H. Bradley, for appellant.

Dyer & Fitchpatrick, for appellee.

BECK, J.—I. The ante-nuptial contract, which is the foundation of plaintiff's action, is in the following language:

“Whereas, a marriage is intended and about to be solemnized between John B. York and Susan Mosier, and the said John B. York is possessed of certain personal and real property of the aggregate value of \$15,000, consisting of 160 acres of land in Story county, Iowa, a fractional eighty acres in Marshall county, notes secured by real estate mortgage against Harundorf and Bachman, horses, hogs, cattle, etc.

“And whereas, Susan Mosier is possessed of personal and real property of the value of about \$800, consisting of half interest in a house and lot in State Center, and team of horses and other personal property.

“Now, in consideration of one dollar each paid to the other,

York v. Ferner.

and the solemnization of the marriage service between the said parties, they each hereby mutually agree that they each hereby relinquish and release to the other all and any rights in and to the property owned by them now separately and severally, forever, and it is further agreed that the property now owned by each of the parties hereto shall descend to the present heirs of said parties, and in no event shall either party hereto demand, receive, or have any interest in and to any part and portion of the property now owned separately and severally by each other.

"It is further agreed that any and all property which may hereafter be owned or accumulated jointly or severally by either of the parties hereto shall be owned in common, and in case of the death or separation of the parties hereto, said property so accumulated after the marriage of the parties hereto shall be divided equally, share and share alike, which in case of death shall go to the lawful heirs of each party hereto.

"And it is further agreed that, in case of the death of the first party hereto before that of the second party hereto, and there should not be any or enough of joint property to support and keep the party of the second part until her death, then in that case the conditions of this agreement shall be so modified as to require the payment out of the property of the said first party the sum of \$400 per year during the remainder of the life of said second party."

The petition alleges and the evidence shows excuse for not presenting plaintiff's claim for allowance by the Probate Court within the time prescribed by the statute. As we determine the case upon other points, these matters need not be considered.

The answer avers that plaintiff, after her marriage with intestate, resided with him but seven weeks and three days, and did then desert and abandon him without cause, and, though requested, refused to return to his house and discharge the duties of a wife. It is also alleged that intestate conducted himself as a good and faithful husband. Upon these

York v. Ferner.

grounds defendant claims that plaintiff has forfeited her rights under the contract and is entitled to no relief. Other allegations of the answer, in the view we take of the case, need not be recited.

II. The evidence shows that plaintiff abandoned the intestate a little more than seven weeks after their marriage, and, though requested to return to him, refused to do so. She alleges that she was justified in this by the drunkenness of the intestate. That he was an inebriate is not denied, and the proof clearly shows that his habits were the same after marriage as before. There is no claim that he became intemperate or drank more after his marriage with plaintiff. No abuse or ill-treatment of plaintiff is alleged or shown, and her only complaint is of his maudlin actions and deportment. She claims, and so testifies, that she did not know he was addicted to drunkenness.

Defendant insists that plaintiff is not competent to testify in this case under Code, section 3639. We will not pass upon the objection to the evidence thus raised for the reason that we think, if her testimony be considered, we cannot find that she was justified in abandoning the intestate. While she testifies that she did not know of intestate's habits before her marriage she positively states that he promised her before marriage, that "he would not drink any more," and that "he would keep sober." His drunkenness seems to have been notorious, and was frequent; her son knew it. It seems incredible that she should have been ignorant of his habits, especially in view of her own testimony that he promised to reform, which she now claims was an inducement to the ante-nuptial contract and her marriage. We have no doubt in our minds that she was fully advised of his habits, and took him for her husband "for better or for worse."

III. The contract of marriage between a man and a woman always contemplates that the parties shall live together as husband and wife as long as the marriage relations shall exist, subject, of course to such absence from one another or

York v. Ferner.

separation as may be agreed upon or may be justified by the law. But, while the marriage relation exists, each has a right to the society and service of the other, and, if these be refused, the marriage rights and duties are thereby disregarded and violated. But there are causes, which, in law, justify a married man or woman in abandoning his or her spouse. These causes are such as will authorize by divorce the dissolution of the marriage contract. It cannot be claimed that a woman discharges the duties and obligations of a wife who, without cause which in law would authorize a divorce upon her application, lives apart from her husband without his consent. The law in some cases may grant to her the right to live separately from her husband when she is the injured party. But in such a case the law, upon her application, would annul the marriage.

Upon the facts shown in this case, plaintiff was not justified in leaving her husband. The intestate was an inebriate when she married him; she could not have obtained a divorce from him on account of his drunkenness. Code, § 2223, ¶ 4. It is not shown, as we have stated, that she suffered any abuse or ill-treatment from him, or that he neglected to provide for her wants and to discharge the duty of a husband. His manners and habits were those of a drunkard; of this she had information before her marriage. She chose a drunkard for a husband and she ought to discharge the duties of a drunkard's wife. She does not show that her personal safety or even her well-being required her to leave him. She doubtless would have lived more comfortably in the society of a sober man, but she ought to have considered, and doubtless did consider, the discomforts of a drunken husband when she married the intestate.

But she urges that he promised reformation. His failure to keep the promise did not justify her in deserting him. All the world knows that such promises made by a drunken man are always broken. In a few words, she knowingly married a drunkard; she must be content to be a drunkard's wife.

Starr v. Case.

IV. The ante-nuptial contract was based upon the contemplated marriage whereby plaintiff became bound to discharge the duties of a wife. Surely such a contract cannot be enforced by the wife who after the marriage abandons her husband without lawful cause. The consideration of the instrument is the marriage contract; if it be broken and violated, the ante-nuptial contract cannot be enforced. It would be monstrous to hold that a woman could collect an annuity settled upon her by a contract in contemplation of marriage, when after the marriage, without cause, she utterly refused to live with her husband longer than seven weeks and three days. This is the precise case before us. Our conclusions, we think, are supported by legal principles and sound reason. *Jacobs v. Jacobs*, 42 Iowa, 600. In our opinion the judgment of the Circuit Court ought to be

AFFIRMED.

59	491
82	234
59	191
88	277
59	491
99	188

STARR ET AL V. CASE ET AL., ADM'RS

1. **Practice in Supreme Court: TIME FOR CERTIFYING EVIDENCE:** **STATUTE CONSTRUED.** In this case, decree was entered April 4, 1881, the evidence was certified by the trial judge August 1, 1881, and the cause was submitted to the Supreme Court April 21, 1882. *Held*, that the evidence was certified in time to entitle appellant to a trial *de novo*, under Chap. 35, Laws of 1882, which provides that the evidence may be certified at any time within the time allowed for taking an appeal, and which is, by its terms, made applicable to all causes not already submitted to the Supreme Court.
2. **Partnership: TIME OF PARTNER: CONTRACT CONSTRUED.** Where articles of co-partnership provided that each partner should give to the business of the firm his whole time and attention, "except such time as may be proper for the fulfilling of the duties of any office or agency held individually by either partner; * * * and neither partner shall accept or continue to hold any office or agency unless by the consent of his co-partner:" *held* that the exception applied not only to offices and agencies held by individual partners at the time of the formation of the partnership, but also to offices and agencies held by a partner at any time during the continuance of the partnership, and the partner so holding any such office or agency was alone entitled to the profits thereof.

Starr v. Case.

3. ——: ACCOUNTING BETWEEN SURVIVORS AND ESTATE OF DECEASED PARTNER. The surviving partners, in an action against the administrator of a deceased partner, cannot have money, which the decedent in his individual capacity held for the use of a third person, appropriated to the payment of a debt owing by such third person, to the firm: not at least, without making such third person a party to the action.
4. ——: APPROPRIATION OF PAYMENT. Where the firm of S., P. & H. was dissolved by the death of P., and C. was owing the firm and was also owing S. & H., and money came into the hands of S. & H. to the credit of C. from the sale of a judgment out of which a part of the account of S. P. & H. arose, *held* that, since neither C. nor S. & H., had made any application of the money, the law would apply it on the debt due S., P. & H., that being the oldest debt.
5. ——: DUTY OF SURVIVOR. It is sufficient that the surviving partners, in settling the affairs of the partnership, act in good faith and with reasonable diligence; and the fact that money came into their hands to the credit of persons who were owing the firm, did not make it obligatory on them to retain out of such money enough to satisfy the debts due the firm, though they might have done so.
6. ——: COMPENSATION OF SURVIVORS. Surviving partners are not entitled to compensation for settling the affairs of the partnership; and the survivors of a *legal* firm are not entitled to compensation for *legal* services rendered in the collection of claims due the firm.
7. ——: USE OF FIRM PROPERTY. Surviving partners are entitled to the exclusive possession and management of the partnership property for the purposes of settling up the partnership business; and in case of the dissolution by death of a firm of lawyers, it was error to charge the survivors for the use of the firm library pending the settling of the partnership affairs.
8. ——: FORM OF JUDGMENT. In an accounting before the court between the surviving partners and the estate of a deceased partner, it was error to render judgment against the survivors *jointly*. The judgment should have been against them *severally*, proportioned to their several liability.
9. ——: APPORTIONMENT OF COSTS. In this case—an action for an accounting between surviving partners and the estate of a deceased partner—each party was adjudged to pay the costs and fees of his own witnesses, and such part of all remaining costs, including costs of appeal, as is proportioned to his interest in the firm.

Appeal from Floyd Circuit Court.

WEDNESDAY, OCTOBER 18.

THIS is an action in equity of P. B. Starr and A. M. Harrison, surviving members of the late firm of Starr, Patterson

Starr v. Case.

& Harrison, against the administrator and heirs at law of J. G. Patterson, deceased, for an accounting of the business of said firm. The petition prays: "That this court order adjudge and decree that an account be taken and had of the said partnership dealings and transactions, between plaintiffs respectively, and said J. G. Patterson, deceased, and that what shall appear therein to be due from defendants to plaintiffs respectively, may be decreed to be paid by defendants to plaintiffs respectively, and that it may be decreed that the plaintiffs have a lien to the amount that shall be found due plaintiffs respectively, on such accounting upon the interest of said J. G. Patterson in the partnership property." The court found that there was due the defendants from the plaintiffs \$1,220.40, and that there was due the defendants from the plaintiff A. M. Harrison the sum of \$88.25 for use of library. The plaintiffs served notice of appeal "from the findings, judgment and decree of the said Circuit Court in said cause."

D. J. Gibson and J. E. Owens, for appellants.

Ellis & Ellis and J. S. Root, for appellee.

DAY, J.—I. The appellees insist that the evidence in the cause was not certified by the judge during the term at which

1. PRACTICE
in supreme
court: time
of certifying
evidence:
statute con-
strued.

the cause was tried, nor during the following vacation, and hence, under the construction placed by this court upon section 2742 of the Code, the cause cannot be tried *de novo*. The decree was entered on the 4th day of April, 1881. The evidence was certified on the 1st day of August, 1881, which was within the time allowed for taking an appeal, and, in fact before the appeal was taken. The cause was submitted in this court on the 21st day of April, 1882. Before the submission of the cause, to-wit: March 10, 1882, chapter 35, laws of Nineteenth General Assembly took effect by publication. This chapter provided that the evidence may be certified by the judge at

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any time within the time allowed for the appeal of the cause. And it is expressly made applicable to all causes not already submitted to the Supreme Court. Under this statute the evidence was certified in time.

II. The decree of the court was reached through the examination of a number of distinct items of account, some of which were determined in favor of, and others adverse to, the appellants. The appellants now insist that, inasmuch as the defendants have not appealed, only those items of account are to be examined with which the plaintiffs are dissatisfied. In support of this position appellants cite and rely upon *Hintrager v. Hennessy*, 46 Iowa, 600; *Smith v. Wolf*, 53 Id., 555; *Cassady v. Spofford*, 57 Id., 237; *Farr v. Reilly*, 58 Id., 399. Whether the facts of this case take it out of the rule of the cases above cited we need not determine. We do not find that the defendants are entitled to a reversal upon any of the points embraced in the decree. It is not, therefore, necessary that we should determine whether the defendants are in a position to insist upon a rehearing of the items determined adversely to them.

III. The co-partnership between plaintiffs and J. G. Patterson was formed on the 13th day of September, 1873. In the division of the proceeds, S. B. Starr was to receive seven-twentieths, J. G. Patterson eight-twentieths and A. M. Harrison five-twentieths. The articles of co-partnership contain the following provisions:

"It is further agreed that at all times during the continuance of their co-partnership each of said partners shall give their (his?) whole time and attendance, and will use their and each of their best endeavors, and to the utmost of their skill and ability, exert themselves for their joint interest and benefit, except such time as may be proper for the fulfilling of the duties of any office or agency held individually by either partner, and for transaction of their private business; and neither partner shall accept or continue to hold any office or agency, unless by the consent of his co-partners." At the time of the

Starr v. Case.

formation of the co-partnership, Harrison was a justice of the peace, and continued to hold that office during the existence of the partnership. On the 7th day of March, 1878, J. G. Patterson was appointed right of way agent for the Chicago, Milwaukee and St. Paul Railway Co., to settle right of way from Algona west, at a salary of \$150 per month and expenses, and he continued in this capacity until his death on the 39th day of October, 1878. For his services during this period he was paid, in addition to his expenses, \$1166. The plaintiffs claim that this sum constituted a portion of the earnings of the firm, and must be divided in the proportion of the respective interests of the partners. We think the articles of co-partnership entitle J. G. Patterson to the benefits of this employment. The articles of co-partnership except from the obligation of each partner to give his whole time and attention to the interest of the firm, "such time as may be proper for the fulfilling of the duties of any office or agency held individually by either partner." Appellants insist that the word *held* is in, past and present tense, and applies only to offices or agencies held by a partner when the co-partnership was formed. This we think is not the proper construction of the exception. The word *held* is the perfect participle of the verb *hold*.

"Participles have no reference to time, they simply show the action, being or state of the verb from which they are derived as finished or unfinished." See Welch's Analysis of the English Sentence, page 87. It is evident from the context that the members of the partnership contemplated their probable future as well as their present relations, when they provide, that "neither partner shall accept or continue to hold any office or agency unless by the consent of his co-partners."

The meaning of the word *held* is not to be determined simply from its form, but from its relation to other parts of the contract, and it must be so construed, if possible, as to give force and effect to all parts of the agreement. The word, whether considered grammatically or in relation to other parts

Starr v. Case.

of the contract, cannot legitimately be limited to an office or agency in the possession of one of the partners when the contract was formed, but includes any office or agency of which a partner might become possessed at any time during the continuance of the co-partnership.

The protection of the other partners is found in the provision that no partner shall accept or continue to hold any office or agency, unless by the consent of his co-partners.

Appellants lay stress upon the words "*as may be proper*," and insist that they qualify the reservation of time made by the individual members of the firm; that the reservation must be so construed as not to interfere materially with the main purposes for which the firm was organized, and that it is now a question for the court to determine whether the time used by Patterson was proper to be withheld from the service of the firm, and appropriated to his own use. Inasmuch, however, as the articles of co-partnership excepted to each partner so much time as might be proper for the fulfilling of the duties of any office or agency held by him, the remedy of the other partners, if dissatisfied with the amount of time devoted by one of their number to an office or agency, was, under the articles of co-partnership, to object to his continuing to hold the office or agency, or to his continuing to devote so much time to it, and, in case he persisted, to dissolve the partnership.

If, however, it should be conceded that it is a question for the court to determine whether the time used by Patterson was proper to be withheld from the firm, we have to say that we are unable to find from the testimony that he neglected the business of the firm. The evidence shows that Mr. Starr had principal charge of collections, and that Mr. Harrison had more exclusive charge of the trial business.

Mr. Harrison testifies as follows: "As a rule Mr. Patterson participated in the trials of causes in which Starr, Patterson & Harrison were employed during the years 1876, 1877 and 1878, though there were some exceptions. He rarely went to Chickasaw county, while I went there almost every term.

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Very frequently, he went to other counties where I didn't go; I don't now recall any case outside of Chickasaw that I tried to court and jury, when Mr. Patterson was not present. The court, we think, properly held that the plaintiffs were not entitled to a share of the earnings of Patterson as right of way agent.

IV. The plaintiffs claim that they are entitled to a share of the earnings of J. G. Patterson as Secretary of the Water Power Company. The facts respecting this employment were properly found by the court below as follows: "It appears in evidence that Mr. Patterson, in the Spring of 1876, was elected Secretary of the Water Power Co.; that he kept the books of the company and did some corresponding for the company while it was operating a grist mill, and spent some time at the mill site during the construction of the dam, race and mill, advising with the superintendent of construction; that he performed these duties usually in the morning before nine o'clock, and evening after six o'clock, and sometimes attended to the books and correspondence on Sundays; but it also appears that he spent considerable time, during the construction of the mill, dam and race, at the mill site, during regular office hours, and did some of his correspondence and work during office hours. It also appears that he received from the company, as Secretary's salary, the sum of \$920, and that he has not accounted to the firm for the same."

The court held that the reservation of time in the articles of co-partnership covers this service. This holding, we think, is correct, for the reasons assigned in the determination of the preceding question.

V. It is alleged in the petition that, at the time of the death of said Patterson, the McGregor and Missouri River

3. — : ac-
counting be-
tween surviv-
ing partners
and estate of
deceased
partner. R. R. Co. was indebted to said firm on book ac-
count in the sum of \$824.76, and that said Pat-
terson had money in his hands belonging to said

Railway Co. sufficient to pay said firm, which had been paid to said Patterson on account of said company,

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and that said Patterson had been paid said amount of \$824.76 by said company, but had omitted to charge himself with the same on said firm books, whereby he is indebted to said Starr for seven-twentieths and to said Harrison for five-twentieths thereof. The court below found against the plaintiffs on this claim, and of this action they complain. The abstract does not furnish the data for understandingly determining this claim. The appellants in argument refer to the original account kept by Patterson with the McGregor & Sioux City Railway Company and the McGregor & Missouri River Railway Company Lands, which shows a balance in his hands of about \$1,199.60 as belonging to these companies. It is claimed from other evidence introduced that Patterson received and retained belonging to these companies the further sum of \$600, and on taxes the additional sum of \$472.20, making in all the sum of \$2,271.80. There is no evidence in the case from which it can be determined that this amount, if received, was received in behalf of the firm. If Mr. Patterson received and retained this amount belonging to these companies, he is liable to account to them therefor. It cannot be appropriated to the payment of an account held by the firm against the McGregor & Missouri River Railway Company, without making that company a party to the proceeding and affording it an opportunity to dispute the correctness of the account. The evidence taken in this case casts very great doubt upon the validity of this account. A. G. Case testifies that soon after his appointment as administrator he had a conversation with Mr. Harrison and Mr. Starr, in which they told him that the charges that had been made in the account against the McGregor & Missouri River Railway Company were large, and more than what the services would stand, and more than what they expected to get, and that they had already got on the account more than they could get. Milo Gilbert, one of the appraisers of the estate of J. G. Patterson, testified that at the time of the appraisalment Starr and Harrison said they thought they would get no more from

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that account; that it had been paid all they would expect to get; that there were large charges in those suits they expected to give off in settlement. Mr. Stevens, another of the appraisers, testified that either Mr. Harrison or Mr. Starr stated that the account ought not to be appraised as shown on the books, because they had got all, or nearly all, out of the railway company they could get, they thought. And Spriggs, one of the appraisers, testified that Mr. Harrison stated that the account was practically paid. It does not appear that at the time of making these statements any claim was made that the account had been paid to Patterson. In view of this testimony the impropriety of appropriating money in the hands of Patterson, to the payment of this account, in an action to which the railway company is not a party, is very apparent. The action of the court on this branch of the case is approved.

VI. On the 30th of December, 1878, John Lawler, the representative of the McGregor & Sioux City and McGregor & Missouri River Railway Co.'s, either as vice-president or as authorized agent, from September 13, 1880, until the time of the death of Mr. Patterson, paid A. G. Case, Adm'r. of Patterson's estate, \$287. Lawler testifies that \$87 of this sum was paid for expenses, and \$250 for services rendered by Mr. Patterson, in 1878, for witness personally. There is no evidence whatever that the payment was made on account of firm or legal business. The court correctly refused to allow the claim of the plaintiffs thereto.

VII. After the death of Patterson, Starr & Harrison, as surviving partners, commenced an action before a justice of the peace against E. M. Clark. E. M. Clark filed a counter-claim against each of the partners individually, that against J. G. Patterson amounting to \$30. The justice's docket does not show clearly whether the counter-claim was allowed, but the testimony of Clark shows that Mr. Patterson had procured from him, on firm account, articles to the amount of \$26.13. The estate should be charged with this amount.

VIII. The plaintiffs filed a supplemental petition showing

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that Starr had collected on account of the firm, since the death of Patterson, various items set forth in a schedule marked 'A' amounting in all to \$1,544.26, and that he had paid the debts of the firm as set out in schedule 'B', amounting to \$766.41. The first item in exhibit 'A' is as follows: "1878, Nov. 21. To received of clerk Circuit Court Cerro Gordo County, judgment Hildreth v. Quincy, \$138.69." The first item of exhibit 'B' is as follows: "1878, Nov. 21. By paid on judg't, Hildreth v. Quincy, \$138.69." Respecting this item the finding of the court is as follows: "The first credit item in schedule 'A', dated Nov. 21, 1878, \$138.69 as received on Hildreth judgment, v. Quincy appears to be a collection made after the death of Mr. Patterson, and does not appear to be a firm transaction, and hence does not properly appear in this account, but as the same amount is charged on the debtor side in schedule 'B', it does not affect the final result either way." Notwithstanding this finding, the court charges S. B. Starr with \$1,544.26, the whole amount received by him since the death of Patterson, including this item of \$138.69, and fails to give him any credit for the amount as paid out, thus making the amount charged to S. B. Starr too great by \$138.69.

IX. The plaintiffs complain of the action of the court in charging them with \$49.75 received from Conley & Co. No 4. — : — : complaint is made with the findings of the court ^{appropriation} of payment on this item, which are as follows: "It appears in evidence that, at the time of the death of Mr. Patterson, the firm had an account against S. J. Conly & Co. to amount of \$172.30. Since the death of Mr. Patterson, Starr & Harrison sold a judgment for Conly & Co., and received therefor \$49.75 to the credit of Conly & Co., and have the amount still in their hands. Starr & Harrison have also an account against Conly & Co., amounting to \$93.50. Some of the account of Starr, Patterson & Harrison grew out of the judgment sold for Conly & Co. by Starr & Harrison. Starr & Harrison have other claims in their hands for collection for

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Conly, and have not presented the Starr, Patterson & Harrison account for payment since the death of Mr. Patterson." It does not appear that either the debtors, Conly & Co., or the creditors, Starr & Harrison, made any application of this payment. The law, therefore, appropriates the payment and applies it to the oldest debt. Parsons on Partnership, page *431. The court, therefore, properly charged the plaintiffs with this amount.

X. It is claimed that the court erred in charging the plaintiffs with fifteen dollars upon the facts found by the court as follows: "It appears that Star, Patterson & Harrison were retained to defend a case in the Circuit Court for Chester Winterrick, and there was an account against Winterrick of fifteen dollars on the firm's books at time of Patterson's death. Starr and Harrison rendered services for Winterrick in same case worth not less than seventy-five dollars, and have a charge against him of ten dollars on another matter. Starr & Harrison have received sixty dollars on the account, and have given no credit to Starr, Patterson & Harrison." Under the views expressed on the preceding point, Starr & Harrison were properly charged with enough of the sum received by them to satisfy the Starr, Patterson & Harrison account.

XI. It is claimed that the court erred in charging the plaintiff with three distinct items, respectively of the amount ~~of \$27.40, \$57, and \$5.25.~~ It is conceded that ^{s. — : — : duty of survivors.} the facts found by the court respecting these items, are correct. These facts are as follows: "That at the death of Mr. Patterson there appeared a balance due the firm of Starr, Patterson & Harrison on the firm's books, from W. & J. G. Flint, to amount of \$27.40. That Starr & Harrison have since received on collections for W. & J. G. Flint more than sufficient money to pay the amount due Starr, Patterson & Harrison. They remitted the full amount of these collections without retaining the balance due Starr, Patterson & Harrison."

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It appears in evidence that at the time of the death of Patterson there was an account on the firm's books against Silverman & Co. of ninety-nine dollars; that since the death of Mr. Patterson plaintiffs received money for Silverman & Co. on land sale, and remitted the same or paid it over without retaining sufficient to pay or satisfy the amount due Starr, Patterson & Harrison. It appears in evidence that at the time of the death of Mr. Patterson there was an account on the firm's books against Bell, Conrad & Co. to the amount of \$5.25; that since the death of Mr. Patterson plaintiffs received fifty dollars for Bell, Conrad & Co. on a claim placed in the plaintiffs' hands for collection since the death of Mr. Patterson, and that plaintiffs did not retain the amount of the Starr, Patterson & Harrison account. The court held that the amount of these several accounts should be charged to the plaintiffs in the accounting between the parties, as though they had retained the same, and that a custom of the late firm, while it existed, not to collect fees on claims until the amount was realized on the claims, would not relieve them as the surviving and settling partners, from this liability. We think the court erred in this holding. While the plaintiffs might have retained the money of these respective parties, coming into their hands in other transactions, and applied it upon a balance of account due the late firm, yet, we think, they were not under legal obligation to do so. And especially is this so, in view of a custom of the late firm not to collect fees on claims until the amount was realized on the claims. The plaintiffs, so long as they act in good faith and with reasonable diligence in adjusting the accounts of the late firm, ought to be allowed to select their own modes of collection. Seven-twelfths of the amount of these claims was coming to the plaintiffs, and they cannot be charged with bad faith or a lack of reasonable diligence, because they did not, in respect to these collections, depart from the custom of the late firm. The plaintiffs should not have been charged with these three items.

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XII. The plaintiffs claimed eighty dollars for services rendered by them in three several suits brought by them, since 6. —: —: the death of Mr. Patterson, for the collection of compensation of surviving claims due the firm of Starr, Patterson & Har-vors. rison. On motion of the defendants this portion of the petition was stricken out. Of this action of the court the plaintiffs complain. It is conceded that the general rule is that surviving partners are not entitled to compensation for settling the affairs of the partnership. It is claimed, however, that legal services rendered in the prosecution of claims due the partnership constitute an exception to the rule. In support of this position we are referred to *Vanduzee v. McMillan*, 37 Ga., 300. That was the case of a mercantile partnership. It was held that one of the members of the firm, who was an attorney, might be entitled to compensation for services rendered by himself in the collection of claims due the partnership. In that case the rendering of legal services was entirely foreign to the business of the partnership. In this case the rendering of such services was the business for which the copartnership was formed. We think there is nothing in this case to make it an exception to the general rule.

XIII. The court charged the plaintiffs eighty dollars for the rent of the library since the death of Mr. Patterson. In 7. —: —: this, we think, there was error. The death of a partner invests the surviving partner with the exclusive right of possession and management of the whole partnership property and business, for the purpose of settling and closing the same. Parsons on Partnership, *440. Besides, the articles of copartnership provide that upon the dissolution of the firm the books shall be divided in the shares that they were contributed. Until the administrators made some effort for a division of the library, as contemplated in the articles of copartnership, it is not equitable that the plaintiffs should be charged with rent therefor.

XIV. The court rendered a judgment against the plaint-

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iffs jointly. They complain that the court did not determine a. — : — : the state of the account between each of the ^{form of judge-} plaintiffs respectively and the defendants. The petition prays that the court order that an account be taken of the partnership dealings between plaintiffs respectively and J. G. Patterson, deceased. The court found the amounts respectively received by each of the plaintiffs before the death of Mr. Patterson, but charged the amounts received by the surviving partners since the death of Patterson to them jointly, and rendered a joint judgment against them. These sums should have been charged to Starr and Harrison respectively in the proportion of seven to five, and a separate account should be stated between each of the plaintiffs and the estate, and separate judgments rendered.

XV. The firm of Starr, Patterson & Harrison prosecuted an action in favor of Roanna Whitcomb v. Abel Whitcomb, to set aside a divorce alleged to have been fraudulently obtained by him, and procured a decree setting aside the divorce, and for \$2,200 alimony. Thereupon, Starr, Patterson & Harrison commenced an action in favor of Roanna Whitcomb against Abel Whitcomb and one Moses to subject certain real estate to the payment of the decree, and obtained a decree as prayed, when Mr. Patterson died. The defendants appealed to the Supreme Court, and Starr & Harrison attended to the case on appeal, and procured an affirmance of the decree. Afterward, they caused the land, consisting of 120 acres, to be sold, and bid it in, in their own name, for \$1,560. At the time of the death of Patterson, Starr, Patterson & Harrison had a balance of account against Mrs. Whitcomb amounting to \$1,378.86. Starr & Harrison have an account against Mrs. Whitcomb for services in attending the appeal and for money expended on her account, amounting to \$922.35. On the 17th day of December, 1878, Starr & Harrison, as surviving partners, filed an attorney's lien on the judgment in favor of Mrs. Whitecomb in favor of Starr, Patterson & Harrison, and also an attorney's lien in favor of

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Starr & Harrison. At this time the account in favor of Starr & Harrison against Mrs. Whitcomb amounted to \$9.46. In apportioning the proceeds of the sale of the lands, the court found that Starr, Patterson & Harrison were entitled to \$1,047.80 thereof.

The defendants insist that the land was worth \$3,000, and Starr, Patterson & Harrison should be credited with the value of the land, less a small sum to be allowed upon the account of Starr & Harrison, instead of the sum for which the land was purchased.

A sufficient answer to this position is that the defendants in their answer do not claim the land, but simply an accounting for the amount realized on the sale thereof. The plaintiffs do not complain of the disposition of the claim by the court.

XVI. The plaintiffs complain of the taxation of costs. The court taxed the witness fees and costs of the plaintiffs to the defendants, and those of the defendants to the plaintiffs, ~~s. — : —~~ and of the other costs, two-thirds to plaintiffs and ~~apportion-
ment of costs.~~ one-third to defendants. It is claimed that this taxation is inequitable, because the defendants introduced an unnecessary number of witnesses. Without inquiry into this position, we think it is more equitable to require each party to pay the fees and costs of his own witnesses. The remaining costs will be divided between the parties in the proportion of their respective interests in the firm. The costs in this court will be divided in the same proportion, except for the amended abstract of appellees, which will be taxed to the appellees. The cause will be remanded for a decree in harmony with this opinion.

REVERSED.

Incorporated Town of Nevada v. Hutchins.

59 506
83 638
59 506
122 214
59 506
131 493

INCORPORATED TOWN OF NEVADA v. HUTCHINS.

1. **Cities and Towns: POWER OVER NUISANCES.** Cities and incorporated towns have no authority to provide by ordinance for the punishment by fine of persons guilty of obstructing the streets by buildings or otherwise. Such obstructions are declared by section 4089 of the Code to be *nuisances*, and section 456 confers upon cities and towns the power only to *abate* nuisances. The power thus expressly granted cannot be extended.
2. **Practice in Supreme Court: SUSTAINING PART OF JUDGMENT.** Where under an ordinance there was a judgment imposing a fine upon defendant for maintaining a nuisance, and an order was appended for the abatement of the nuisance at his costs, this court, being obliged to reverse the judgment as to the fine, cannot sustain the order for the abatement, which was merely incidental to the penalty.

Appeal from Story Circuit Court.

WEDNESDAY, OCTOBER 18.

THE defendant is the owner of a hotel in the town of Nevada. In front of the building there is a porch, and steps thereto, which extend beyond the line of defendant's lot and into the adjacent street about eight feet, and which totally obstruct that part of the street covered by them, the porch being some four or five feet above the level of the street. Under the porch and within the street there is an excavation made for the purpose of an entrance or passage-way to the basement of the hotel.

An information was filed against the defendant under an ordinance of the town charging him with keeping and maintaining an obstruction in the street. The defendant was arrested, tried and convicted before the mayor, and was fined in the sum of five dollars, and an order was made for the removal of the porch and steps, and requiring that the excavation in the street be filled. An appeal was taken by the defendant to the District Court, where a trial was had, and a like judgment was entered. Defendant appeals.

Incorporated Town of Nevada v. Hutchins.

John A. McCall, for appellant.

Dyer & Fitzpatrick, for appellee.

ROTHROCK, J.—I. The ordinance upon which the prosecution is based, so far as applicable to the case, is as follows:

“SEC. 87. (1.) Be it ordained by the town council of the incorporated town of Nevada, that if any person shall place any

obstruction or excavation on any street, sidewalk
1. CITIES and towns: power over nuisances. or alley within said town, or dig up or excavate,
or shall keep any such obstruction in any street, sidewalk or alley, either by excavation or otherwise (except it be for a reasonable time in receiving or discharging freight or other goods, and the erection of buildings), he shall be fined in any sum not exceeding fifty dollars, nor less than five dollars, and said obstruction shall be removed at his or her expense.”

It is contended by counsel for appellant that the ordinance is void, so far as applicable to this case, because the town had no authority under the statutes of the State to enact it.

Section 456 of the Code, in enumerating the powers of cities and towns, provides that “They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated; * * * to prevent any riots, noise, disturbance, or disorderly assemblages, to suppress and restrain disorderly houses, houses of ill-fame, billiard tables, nine or ten pin alleys or tables, and ball alleys, and to authorize the destruction of all instruments and devices used for purposes of gaming, and to protect the property of the corporation and its inhabitants, and to preserve peace and order therein.” The act with which the defendant is charged is expressly declared to be a nuisance by section 4089 of the Code, which provides that “the obstructing or incumbering by fences, buildings, or otherwise, the public highways, private ways, streets, alleys, commons, landing places or burying grounds, are nuisances.”

Incorporated Town of Nevada v. Hutchins.

The power given by section 456 is to abate nuisances, and the question made is that under this power the town cannot, by fine, punish one who maintains a nuisance. In the case of the *City of Chariton v. Barber*, 54 Iowa, 360, it was held that the power to suppress and restrain disorderly houses, houses of ill-fame, etc., provided by this section, did not authorize the passage of an ordinance declaring the keeping of such a house a misdemeanor and imposing a punishment therefor. This case followed the case of the *City of Mount Pleasant v. Breeze*, 11 Iowa, 399. These cases were again followed in the case of the *Town of New Hampton v. Conroy*, 56 Iowa, 498.

Under section 456, power is given to "abate" nuisances and to "suppress and restrain" gambling houses. Now if, as we have held, this power to suppress and restrain does not authorize the passage of an ordinance providing punishment by fine for keeping a house of that character, it is difficult to see how such an ordinance can be approved punishing the maintaining of a nuisance by a fine, when the statute merely authorizes its abatement by the town.

The shade of difference in the meaning between the words "abate" and "suppress" is so fine that it cannot be said that the power of punishment can be exercised in one case and not in the other. We do not feel called upon to overrule the cases cited. They have been too long acquiesced in to be now disturbed. The case of *Mount Pleasant v. Breeze* was determined more than twenty years ago.

The decisions which we have cited are not inconsistent with the case of *Town of Bloomfield v. Trimble*, 54 Iowa, 399. That was a prosecution under an ordinance providing a penalty for intoxication. It was held that the ordinance was valid under the general provisions contained in sections 456 and 482 of the Code, which empower towns to "preserve peace and order therein," and promote the comfort and convenience of the inhabitants.

No express provision is made defining the power of towns

Incorporated Town of Nevada v. Hutchins.

over the offense of intoxication as is made in the case of maintaining a nuisance or keeping a gambling house or house of ill-fame. The same may be said of the case of *City of Centerville v. Miller*, 57 Iowa, 56 and 225. In that case it was held that the town had power, under the general provisions of the sections of the statute above cited, to punish the keepers of disorderly houses, because they are authorized to "prevent" riots, noises, disturbances and disorderly assemblies. An ordinance prohibiting these offenses under proper penalties is about the only preventive which we could conceive.

The case before us is different. The statute explicitly determines that maintaining a building in a street is a nuisance, and that incorporated towns and cities may abate nuisances. Having in express terms prescribed the power over this subject, under the authority of the cases above cited, such power cannot be extended.

These views dispose of this case. The idea that the ordinance may be void as to the penalty but valid as to that part which provides for the abatement of the obstruction, cannot affect this case. Here the defendant was prosecuted and fined. We cannot affirm a part of the case and reverse the remaining part. The principal thing is the penalty, and the order of abatement is a mere incident.

It is unnecessary that we should determine the other questions in the case, in view of the fact that the ordinance is void as applicable to this offense, and there can be no retrial under it. There can be no great hardship in the limit thus placed upon the power of municipal corporations. The law of the State prescribing and punishing the maintenance of nuisances is ample for the protection of the public.

REVERSED

Gates v. Brooks.

GATES V. BROOKS ET. AL.

59	510
82	343
59	510
88	131
59	510
108	479
59	510
111	185
59	510
124	266

1. **Practice in Supreme Court: ABSTRACT DEEMED CORRECT.** Where appellee does not present any additional abstract amending the abstract of appellant, this court must accept the abstract of appellant as correct, and what appears on the face thereof to be true.
2. ———: **BILLS OF EXCEPTIONS NOT SIGNED AND FILED IN TIME.** Where the appellant's abstract fails to show that the bill of exceptions was signed and filed during the term, or that the time to do so was by consent extended beyond the term, such bill will be stricken out in this court on motion, especially when appellant's counsel appear to have been served with notice of the motion, but take no notice of it in argument.
3. ———: **PASSING ON CONSTITUTIONALITY OF A STATUTE.** When the appellant for the first time in his argument in reply contends that a statute is unconstitutional, the argument comes too late to be considered by this court. Appellee should have had an opportunity to answer the argument. It is only after the fullest argument, and the most mature consideration, that this court will pass upon so important a question.
4. ———: **QUESTION NOT RAISED BELOW: COSTS.** A party aggrieved by the taxation of costs should move in the court below to have the same re-taxed. When appellant failed to make such motion, or, if he did make it, failed to assign error to the ruling thereon, he cannot be heard in regard thereto in this court.

ON REHEARING.

5. **Constitutional Law: STATUTE HELD CONSTITUTIONAL.** In determining the constitutionality of a statute, even a reasonable doubt must be solved in favor of the legislative action, and the act sustained; and section 2 of chapter 8 of the laws of 1874, which provides a summary process for determining and locating the true boundary line between land owners, without any issue made in court, or trial by jury, *held* not in conflict with section 9, article 1 of the constitution, which provides that the right of trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty or property, without due process of law.

Appeal from Clarke District Court.

WEDNESDAY, OCTOBER 18.

THIS is a proceeding under section two of chapter eight of the laws of 1874, to establish certain courses and boundary lines of lands of the respective parties. Commissioners were

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appointed and a survey was made which established certain courses and boundaries. The commissioners made their report to the court. The defendants filed objections thereto. The objections were overruled and the report was affirmed, and the costs were adjudged against the defendants. Defendants appeal.

James Rice & McIntire Bros., for appellants.

John Chaney, for appellee.

ROTHBROCK, J.—I. The appellees upon the submission of this cause filed a motion to affirm the judgment of the court 1. ~~PRACTICE~~ below, upon the ground that appellants did not in supreme court : ab-
stract deemed cor- except to the ruling of the court in affirming the report of the commissioners, at the time the same was made, nor for some time after the adjournment of court. The motion refers to page 15 of the abstract. The point in the motion cannot be sustained. It does not appear from the abstract that the exception was taken out of time. On the contrary the exception is noted at the conclusion of the order and judgment for costs, as though taken at the time. Appellee does not present any additional abstract amending the abstract of appellant, and we must therefore accept the latter as correct.

II. The motion also asks that the bill of exceptions which contains all of the evidence be stricken out, because it was 2. ~~not signed~~ : bill not signed by the trial judge, nor filed, until of exceptions nearly one month after the adjournment of the time. and filed in court, and without any time having been given beyond that fixed by law for settling and filing bills of exception.

This part of the motion is well taken. The appellant's abstract shows that the final order was made in the case on the —day of May 1879, and that the bill of exceptions was presented to the District Court June 26, 1879. It nowhere appears that the bill was signed and filed during the term, nor that the time to do so was by consent extended beyond the

Gates v. Brooks.

term. The motion appears to have been served upon counsel for appellants, and no resistance is made thereto, and no notice thereof is taken in the argument in reply. Under these circumstances, we must sustain the motion to strike the bill of exceptions. *Lynch v. Kennedy*, 42 Iowa, 220; *Gibbs v. Buckingham*, 48 Id., 96.

III. The appellants for the first time, in their argument in reply, raise the question as to the constitutionality of the ~~statute under which this proceeding was had. If it was desired that so important a question should be passed upon by this court, it should have been presented in such way that an opportunity would have been allowed counsel for appellee under the rules to answer the argument. It is only after the fullest argument, and the most mature consideration, that this court will pass upon so important a question.~~

IV. The bill of exceptions having been stricken from the record, there is no question presented in the argument of appellants, upon the merits of the case, which we can consider.

A question is made in argument as to the costs. The statute expressly requires "the expenses and costs of the ~~sur-
vey and suit shall be apportioned among all the
parties according to their respective interests."~~

Acts of 1874, chapter 8, § 4.

The court taxed all the costs to the defendants. The statute requires that any party aggrieved by the taxation of a bill of costs may upon application have the same retaxed. Code § 2944. It does not appear that such application has been made. But whether made or not we cannot consider the question upon this appeal, as error has not been assigned in the matter of awarding costs.

AFFIRMED.

ON REHEARING

In the petition for a rehearing, our attention is called to the fact that what we took to be a reply by appellant to the

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appellee's argument is not such, but an additional argument, and filed within such time that the question raised therein in respect to the constitutionality of the law under which the proceedings were instituted, must be determined.

The statute in question provides in substance that, where the owners of land cannot agree with the owner of adjacent land, in regard to the boundary line between the tracts, he may cause a notice to be served upon the owner of the adjacent land, that on a day named he will apply to the District Court for the appointment of a commission of one or more surveyors to survey and establish the boundary line. The statute also provides that, on the day named, if a proper petition and proof of due notice have been filed in the District Court, the court shall appoint a commission of one or more surveyors who shall survey the boundary line, and make a report of their doings, accompanied by a plat and notes of the survey.

The statute also provides that the commission may take evidence, and incorporate the same with their survey; and that upon the filing of the report any person adversely interested may enter objections to it, and the court shall hear and determine the same; and shall approve or reject the report, or modify it, as it shall see fit, and enter judgment accordingly. § 2 chapter 8 laws of 1874.

The proceeding contemplated is a summary proceeding designed to determine and locate the true boundary line between land owners, without any issue made in court, or trial by jury.

The defendants contend that the statute is in conflict with section 9, article 1 of the constitution, which provides that the right of trial by jury shall remain inviolate, and that "no person shall be deprived of life, liberty, or property, without due process of law." The defendants insist that they have been deprived of their property without due process of law.

To determine this question, we have to consider what is
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the precise nature of the defendant's claim. The line in dispute is the section line between sections 15 and 22, township 71, north of range 24, west. The plaintiff is the owner of the northwest $\frac{1}{4}$ of section 22, and the defendants are the owners of the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 15, which lies north of, and adjacent to, the plaintiff's land. The plaintiff never denied that the defendants are entitled to the land called for by their deed. There is no question of title between the parties in any proper sense. A controversy arises only when the parties attempt to apply their respective deeds to the face of the earth. The question is one of location. All the claim which defendants make to the land in controversy, so far as this proceeding is concerned, is conditional. They claim the land in controversy if it is within section 15. We find, it is true, some intimation that they claim it absolutely by adverse possession. But with such claim we have nothing to do in this proceeding. Such a claim, if it is valid, is independent of the true location of the section line. We have to do with nothing except the conditional claim, which is dependent wholly upon the true location of the section line.

Where parties make a conditional claim against each other of this kind, and proceedings are instituted under the statute to determine the fact upon which the respective claims are conditioned, we are not prepared to say that the unsuccessful party is deprived of property within the meaning of the constitution. The question to say the least admits of great doubt. Now it is an elementary principle, in determining the constitutionality of a statute, that even a "reasonable doubt must be solved in favor of the legislative action, and the act sustained." Cooley on Const. Lim., 182 and cases cited. Such being our view of the nature of the defendant's claim, we cannot properly hold the statute unconstitutional.

This is the only question presented in the petition for rehearing, and we have to say that the former opinion is adhered to and the judgment affirmed.

Murphy v. McMillan.

MURPHY v. McMILLAN.

1. Criminal Practice: FAILURE OF JUDGE TO FIX AMOUNT OF BAIL ON IMPOSING SENTENCE. Where the court, on rendering judgment of imprisonment for grand larceny, failed to fix the amount of bail as required by section 4511 of the Code, the defendant was entitled to have the omission corrected, but he was not, on *habeas corpus*, entitled to be discharged from custody on account of such omission.

Appeal from an order of Hon. D. D. Miracle, Judge of the Circuit Court of 11th Judicial District.

WEDNESDAY, OCTOBER 18.

THE defendant is warden of the penitentiary at Ft. Madison and the plaintiff is confined therin. For the purpose of testing the legality of his confinement, the plaintiff obtained a writ of *habeas corpus*. Upon the hearing it was held the plaintiff was not illegally restrained and he was remanded to the custody of the defendant. From such order the plaintiff appeals.

Gilman, Birdsall & Wilner, for appellant.

Smith McPherson, Attorney-general, for the State.

SEEVERS, Ch. J.—The plaintiff was indicted and sentenced to be confined in the penitentiary for the commission of the crime of grand larceny. The record fails to show that at the time sentence was pronounced the amount in which bail might be taken was fixed as provided in Code § 4511, which is as follows:

“In all cases except murder in the first degree, the court rendering judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such an order is made.”

Because the record fails to show the required order was made, the plaintiff insists he is illegally restrained and is entitled to be discharged. That his imprisonment is irregular

Murphy v. McMillan.

and erroneous will be conceded, but it does not follow that it is void and he entitled to be discharged from custody. It is conceded the object in fixing the amount of bail is for the purpose of an appeal to the Supreme Court. When the bail thus fixed is given and an appeal taken, the sentence stands suspended until the case is determined by the Supreme Court. Such being the object of the statute, what consequences should result from the court's failure to enter of record the requisite order. The plaintiff clearly was entitled to such an order, but he failed to ask that it be made. Possibly he was not compelled to do so. His right to appeal was in no manner abridged by the failure of the court in the respect mentioned. If, pending the appeal, the plaintiff desired to be admitted to bail, this could have been done in a proceeding of the same character as the present. We think the plaintiff had the right to have that done which the court failed to do. The statute declares the consequences which shall result from a failure to make the order, and that is the execution of the judgment shall not take place until the order is made. The plaintiff could have prevented the execution of the judgment by obtaining a writ of *habeas corpus* for the purpose of having the bail fixed. Possibly he is entitled to such relief now if he desires it. But at most, at some time, on his application, the plaintiff had the right to have the omission of the court corrected.

Much has been said by counsel in relation to whether this statute is mandatory or directory. It does not seem to us material which it is; for, in no event is the plaintiff entitled to his discharge, but simply to have such an order as the court should have made. More than this he is not entitled to.

AFFIRMED.

Mayfield v. Maasden.

MAYFIELD V. MAASDEN ET AL.

59	517
83	69
59	517
4122	563

1. **Homestead:** PART OF BUILDING EXEMPT AS. Defendant owned a two story brick building twenty by eighty feet, with basement, and the part of the lot on which it was built. The front room of the basement had been (but not since the rendition of plaintiff's judgment) used as a barber shop. The first story above the basement, except the stairway and two small rooms constructed by temporary partitions, was occupied as a business room. Defendants with their family lived in the building, and occupied the whole second story above the basement, and had the sole use of the stairway, and used to some extent for storage the two temporary rooms above referred to on the first floor above the basement:—*Held* that the whole second story, the stairway, the basement and the ground constituted defendant's homestead, but that the first story, except the stairway was subject to execution.

Appeal from Marion District Court.

WEDNESDAY, OCTOBER 18.

ACTION in equity to establish the lien of a judgment upon certain premises, and to subject them to the payment of the judgment. The defendants, L. Maasden and Marie E. Maasden, aver that the premises constitute their homestead, and that as such they are exempt from execution.

The premises in question consist of a fraction of a lot in the city of Pella, on which is a two story brick building twenty-five by eighty feet with a basement. The front room in the basement was at one time occupied as a barber shop. The defendants' family lives in the building occupying the whole second story above the basement. In the first story above the basement two small rooms were constructed by partitions about seven feet high, and were used to some extent by the family for storage. The room in other respects is occupied as a business room, to-wit: a grocery store, saloon and restaurant. The building is a section of a block, and appears to have been built for business purposes. Stairs lead from the street to the second or residence story, and the stairway is taken out of a corner of the business room, but it is

Mayfield v. Maasden.

enclosed, and there is no access to the second story directly from the business room.

Upon these facts, the court held that the basement room which was at one time occupied as a barber shop, and the first story were not exempt; and that there were exempt the remainder of the building and the ground upon which the same is situated, and entered a decree accordingly. The defendants appeal.

Bolton & McCoy, for appellants.

Lafferty & Johnson, for appellee.

ADAMS, J.—The defendants insist that the case comes within the rule in *Wright & Co. v. Ditzler*, 54 Iowa, 620. In that case the building was held exempt as a homestead, notwithstanding the lower story was occupied as a store. It was thought to be distinguishable from *Rhodes, Pegram & Co. v. McCormick*, 4 Iowa, 368, on account of the size and character of the building and the purpose for which it was originally intended. Some importance also was attached to the fact, that access to the second or residence story was had through the lower or business story, and through the business room itself, which rendered a sale of the lower story impossible, without a positive interference with the defendant's homestead rights. The case at bar is different, and falls more nearly, we think, within *Rhodes, Pegram & Co. v. McCormick*, and the doctrine of that case we think must govern. We are aware that the decision has been criticised, and some doubt may exist in regard to its correctness, but it has stood so long, that we should not be justified in overruling it, even if we were otherwise disposed to do so.

We have to say, however, that we do not think that the decree can be wholly sustained. The sale of the entire lower story would include the stairway by which the residence story is reached from the street. As the stairway is partitioned off, we think that so much of the lower story as is occupied

Welch v. McGrath.

by it is exempt. It appears to us, also, that the whole basement is exempt. No part appears to have been occupied for business since the rendition of the judgment, and all not occupied for business we think should be deemed to be included in the homestead.

As to the small apartments constructed in the first story by partitions about seven feet high, we have to say that they seem to constitute essentially a part of the room out of which they are carved, which room, as we hold, being mainly a business room, is not exempt. We see no occasion for any modification of the decree, except in regard to the stairway and the so called barber shop. The exemption, we think, should be extended so far as to embrace them with the other parts held exempt.

MODIFIED AND AFFIRMED.

WELCH v. MCGRATH.

59	519
90	430
59	519
107	650
59	519
126	317
59	519
131	322

1. **Mechanic's Lien: statement for: form of.** Under section 1851 of the Revision, as amended by chapter 111, of the laws of 1862, it was not necessary, in a statement for a mechanic's lien, to set forth the name of the owner of the property at the time the lien was filed, accordingly it was *held* that, where the owner who had incurred the indebtedness died before the filing of the lien, it was sufficient, as against the heirs, to file the lien against the *estate* of the deceased owner.
2. ——: **foreclosure of: parties to.** In an action to foreclose a mechanic's lien, under sections 1858 and 1859 of the Revision, where the owner who had incurred the indebtedness died before the suit was brought, it was not necessary to make the heirs parties to the suit. A foreclosure against the administrator of the deceased party is just as binding upon his heirs or devisees as would have been a foreclosure against himself during his life time.
3. ——: **statute of limitations waived.** Where, in an action to foreclose a mechanic's lien, there were proper parties defendant, who might have plead the statute of limitations, but did not, *held* that the defense was waived, and that it could not afterwards be interposed in a collateral proceeding to defeat the title acquired by the foreclosure proceedings.

Welch v. McGrath.

4. **Administrator:** **RIGHT TO ACQUIRE TITLE TO PROPERTY OF DECEDENT.** Where the property of decedent was sold at judicial sale, *held* that the administratrix who was decedent's widow, was not, on account of her fiduciary relation to the estate, precluded from taking to herself an assignment of the certificate of purchase from a third party, and that a deed made to her thereunder gave her as good a title to the property as against the heirs as such a deed would have given to her assignor.

On re-hearing, the 4th point was affirmed, and the following additional points were made in argument.

5. ____: _____. In the absence of fraud, one who, as a trustee, has sold an estate, may afterwards repurchase it for himself.
6. ____: _____. A purchase by an executor, under an execution against his testator, is not void, but simply voidable at the election of the legatees, exercised within a reasonable time.
7. **Practice:** **RELIEF LIMITED BY PLEADINGS.** Relief can be granted alone on the case made in the pleadings: Accordingly *held* that, as plaintiff can have relief only by the setting aside of a judicial sale, which sale she has not attacked in her petition, she cannot have the relief demanded in this case.

Appeal from Des Moines Circuit Court.

WEDNESDAY, OCTOBER 18.

THE plaintiff alleges in substance in her petition that she is a minor, the adopted child and sole heir of Wm. Welch, deceased; that Wm. Welch died July 27, 1870, seized of lots eighteen and nineteen, in Cameron's addition to the city of Burlington, which property was the homestead of decedent and of this plaintiff, his daughter, and has ever since been used by plaintiff as her homestead, with her adopted mother, Ann McGrevy, the former widow of said Welch, deceased. That said Ann Welch, widow, afterward married one Hugh McGrevy, but continued to occupy said lots and the house as her homestead, and that of this plaintiff. That the defendant, Mary McGrath, claims to have some right or interest in said lots, founded upon the fact that, about May 20, 1874, said Ann McGrevy, former widow of Wm. Welch, and Hugh McGrevy, her husband, made a mortgage upon said property to the defendant, upon which a decree of foreclosure was entered, execution was issued, and a sale was made to the de-

Welch v. McGrath.

fendant. That the said Ann and Hugh McGrevey had no mortgageable interest in, nor right to convey said property, and that the mortgage and sale pursuant thereto are void as against the heirship, title and homestead rights of the plaintiff. The plaintiff prays that the decree of foreclosure and proceedings thereunder may be set aside, and plaintiff's title confirmed. The defendant filed answer, admitting that plaintiff is the adopted child of Wm. Welch, deceased, but denying that the property in question was his homestead, and denying the other main allegations in the petition, and averring that in the year 1874 Ann McGrevey became the absolute owner of the property described; that defendant loaned money to her thereon, and that the mortgage given therefor has been foreclosed, and the land sold thereunder, and that she holds the sheriff's certificate. The defendant also filed a cross-bill setting forth an abstract of title, showing the following facts:

1. That in October, 1872, George Jefferys commenced an action in the Des Moines Circuit Court, against Ann Welch and Charles O'Brien, to foreclose a mechanic's lien on the real estate in controversy. Original notice was personally served on both defendants, October 28, 1872; both defendants answered November 15, 1872, and judgment in favor of plaintiff was rendered, February 21, 1873, for fifty-nine dollars and fifty-seven cents, and a mechanic's lien established.

2. On the above judgment the property was sold May 13, 1873, to J. W. Heisey and Chas. O'Brien. The certificate of purchase was assigned to Mary McGrath and by her to Ann McGrevey, to whom a sheriff's deed was duly executed, which was filed for record and recorded May 13, 1874.

3. On the 15th of May, 1874, Ann McGrevey and her husband executed to the defendant, Mary McGrath, a mortgage on said lots, to secure the sum of \$400, which mortgage was duly foreclosed May 30, 1878, and upon execution issued thereunder the property was sold to Mary McGrath, August 13, 1878. The cross-bill prays that the property be quieted in defendant.

Welch v. McGrath.

To this cross bill the plaintiff filed a replication as follows:

"1. Averring that the title to said property, derived by and through Geo. Jefferys, is wholly null and void as to this plaintiff, for the reason that the work for which said lien was claimed was all done and completed on a contract prior to the second day of April, 1870, before the death of said Wm. Welch; that said Welch died July 27, 1870, leaving plaintiff, a duly adopted child, sole heir-at-law of said Wm. Welch; that no claim for a lien thereunder was filed until April 16, 1872, more than two years after the completion of the work, and that said claim for a lien was not filed against this plaintiff, as owner of said property, but against "Wm. Welch's estate," and no other lien or claim was filed by him. [Exhibit showing claim filed with clerk as part of the reply.]

"No notice of the claim for mechanics' lien was ever served upon plaintiff, either in person or on her guardian.

"2. The petition for the enforcement of said lien was not filed until October 26, 1872, more than two and one half years after the work was done, and more than two years after said Welch's death. And in such proceedings for foreclosure of said mechanics' lien, this plaintiff was in no way made a party, or notified thereof; that said proceedings were only against Charles O'Brien and Ann Welch, as administrators of said Wm. Welch's estate; and upon this proceeding to foreclose said mechanic's lien *alone* the defendant's title above set up is based.

"Therefore, all of said proceedings to establish said mechanics' lien, and the sale thereunder, were insufficient to divest the plaintiff's title, she being at the time a minor only six years old, and did not estop her now asserting her right."

A copy of the petition entitled "lien foreclosure," is annexed as an exhibit.

"3. The Ann Welch mentioned in defendant's abstract, to whom the sheriff's deed was made, is the same Ann Welch who was administratrix of the estate of Wm. Welch, deceased, and who had a homestead interest in the said realty, and was

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incapacitated by reason of her said relationship to said estate and the plaintiff and the property, to acquire a title thereto adverse to plaintiff, and the defendant, McGrath, had full notice of all said facts when she took the mortgage."

All other allegation of cross bill are denied.

Exhibit claim against Wm. Welch's estate in favor of George Jefferys, 1870, April 2, showing balance due of \$58.57.

"Sworn to and marked filed on the 16th day of April, 1872.

Wm. GARRETT, Clerk, D. C."

EXHIBIT.

"Lien foreclosure" sets forth petition of George Jefferys to foreclosure above lien as follows:

GEORGE JEFFERYS,

v.

ANN WELCH AND CHARLES O'BRIEN,
Administrators of the estate of Wm. Welch, deceased.

Petition in usual form, claiming foreclosure of above lien claim, marked "filed October 26, 1872.

Wm. GARRETT, Clerk C. C."

EXHIBIT.

Notice in above entitled cause, addressed to said Ann Welch and Charles O'Brien, as administrators of Wm. Welch's estate, to a term of Circuit Court to be held November 11, 1872.

To this replication the defendant demurred as follows:

"1. The facts stated constitute no defense to said cross-bill.

"2. The fact that the mechanic's lien of Jefferys was not filed till after the death of Wm. Welch, is no defense.

"3. The plaintiff is estopped by the judgment and decree establishing and foreclosing the Jefferys mechanic's lien, from denying that he, Jefferys, was entitled to such lien.

"4. No facts are shown to justify this court in interfering with the title which defendant has asserted in her cross-bill.

"5. Ann Welch's demanding that the property be sold,

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subject to redemption, is immaterial. She not having offered to redeem.

"6. The facts in defendant's cross bill show that Ann Welch at the time she took the sheriff's deed, was not acting in a fiduciary capacity."

The court sustained this demurrer. The plaintiff declined to further plead, and the court decreed that the defendant is the owner of the property in controversy, and entitled to a deed from the sheriff therefor. The plaintiff appeals.

P. Henry Smyth, T. W. Newman and D. Y. Overton,
for appellant.

Hall & Huston and T. J. Trulock, for appellee.

DAY, J.—I. The appellant claims that the lien, to be valid, should have been claimed against the owners of the property <sup>2. MECHANIC'S
lien : state-
mentor: form</sup> at the time the lien was filed, and not against the estate of William Welch. The appellant relies upon *Robbins v. Burns*, 34 N. J. Law, 322. In that case it was held that, where the owner of the building on which the lien was claimed died before the lien was filed, the claim for a lien should have been filed against the parties who were owners by inheritance at the time the lien was claimed, and not against the executors of the former owners.

The decision was based upon the peculiar provisions of the New Jersey statute, which requires that the lien claim shall contain, amongst other things, the name of the owner or owners of the land upon which the lien is claimed. The law in force at the time this lien was claimed was section 1851 of the Revision of 1860, as amended by Chapter 111 of the Ninth General Assembly, and was as follows: "It shall be the duty of every person, except as has been provided for a subcontractor, who wishes to avail himself, of the provisions of this chapter, to file with the clerk of the District Court of the county in which the building, erection, or other improvement to be charged with the lien is situated, and within

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ninety days after all the things aforesaid shall have been furnished, or the work or labor done or performed, a just and true account of the demand due or owing to him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit. But the failure to file the claim, account, settlement, or demand in the time named in this section and in section 1874, shall not operate to defeat the claim or demand, nor the lien of the person supplying the labor or material, as against the owner, nor the contractor, nor as against any one except purchasers or incumbrancers, without notice, whose rights accrued after the ninety days and before the account, or settlement, or claim, or lien is filed."

This statute does not, as does the New Jersey statute, require that the claim for a lien shall contain a statement of the name of the owner of the property against which the lien is claimed. The statute simply requires that the party claiming the lien shall file a just and true account of the demand owing to him, containing a correct description of the property to be charged with the lien. When the person against whom the claim originated is dead, the proper course, we think, in view of the provisions of the statute which we have cited, and the provisions of section 1857 of the Revision, is to make out the account for the demand due, against the estate which is liable for its payment, and not against the heirs, who are not liable for it. We are not authorized to hold, under the provisions of the statute cited, that the claim for a lien should contain the name of any other party than the one who owes the debt. It is claimed, however, that it is necessarily implied in section 1852 of the Revision, that the claim for a lien shall contain the name of the owner of the property at the time the lien is filed. This section provides as follows: "It shall be the duty of the clerk of the District Court to indorse upon every account the date of its filing, and make an abstract thereof in a book by him to be kept for that purpose and properly indexed, containing the date of its

Welch v. McGrath.

filings, the name of the person laying or imposing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same." Unless the person against whom the account is filed had some interest in the property when the lien arose, or when the claim therefor was filed, the lien would be unavailing. This section assumes that the person against whom the claim is filed has, or had, some interest in the property upon which the lien could operate.

The requirement that the clerk's abstract shall contain the name of the person against whose property the lien is filed, really amounts to no more than that it shall contain the name of the person against whom the account is filed, and a claim for a lien is made. If the legislature intended that the statement for a lien should contain the name of the owner of the property at the time the lien is filed, it is incredible that section 1851 should remain altogether silent respecting it, and that the requirements should be left to be inferred from the provisions of another section having no reference to what the statement should contain, but simply prescribing the duties of the clerk in relation thereto.

II. It is claimed that the foreclosure of the lien, and all the proceedings subsequent thereto, are void, as to the plaintiff, because she was not made a party to the foreclosure. The foreclosure proceeding was had against the administrator of the estate of William Welch, deceased. The provisions of the statute upon this question are contained in the Revision, and are as follows:

"Sec. 1858. In all suits under this act, the parties to the contract shall, and all other persons interested in the matter in controversy, and in the property charged with the lien may, be made parties, but such as are not made parties shall not be bound by any such proceedings."

"Sec. 1859. In case of the death of any of the parties specified in the immediately preceding section, whether be-

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fore or after suit brought, the executor or administrator of such deceased party shall be made plaintiff or defendant as the case may require, and it shall not be necessary to make the heirs or devisees of such deceased persons parties to such suit."

William Welch was a party to the contract, and, if he had been living at the time the suit was commenced he would have been a necessary party. He died, however, before the suit was commenced and the plaintiff became one of the heirs. Under section 1859, the administrators of the estate of William Welch became proper parties defendant, and it was not necessary to make the heirs parties. It is said that, under section 1858, persons interested in the property charged with the lien not made parties, are not bound by the proceedings. But section 1858 refers in this provision to all other parties than the parties to the contract. When a party to the contract dies, his administrator or executor becomes his representative as to all matters connected with the suit, and by express provision of the statute, it is not necessary to make the heirs parties. A foreclosure against the executor or administrator of a deceased party to the contract is just as binding upon his heirs or devisees, as would have been a foreclosure against the party himself during his lifetime.

This case is not like *Gates v. Ballou*, 56 Iowa, 741. In that case the land on which the lien existed was sold before the action to foreclose the lien was commenced. The statute upon which this decision is based does not apply to that case.

III. The account against William Welch matured April 2, 1870. The claim for a lien was filed April 16, 1872.

3. — : — : Statute of Limitations waived. The action to foreclose the lien, was not commenced until October 26th, 1872, which was two years and nearly seven months from the time the account matured.

The reply alleges this fact against the sufficiency of the title acquired under the lien foreclosure. As we have seen, the proper parties were made to the foreclosure proceeding. The decree entered in that proceeding

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is binding until set aside in the proper manner. The defendants could waive the statute of limitations, and having failed to interpose it at the proper time, it cannot be made available now.

IV. The plaintiff's replication alleges that Ann Welch, (McGrevey) mentioned in defendant's abstract, to whom the sheriff's deed was made, is the same Ann Welch ^{5. ADMINISTRATOR: right to acquire title to property of decedent.} who was administratrix of Wm. Welch, deceased, and who had a homestead interest in the said realty, and was incapacitated by reason of her said relationship to said estate and the plaintiff and the property to acquire a title thereto adverse to the plaintiff. The abstract of title set forth in the defendant's cross-bill, and the correctness of which is not denied, shows that the property was sold at sheriff's sale to J. W. Heisey and Charles O'Brien, who assigned the certificate of purchase to Mary McGrath, who assigned the certificate to Ann McGrevey (Welch). Ann McGrevey did not purchase the property at the sheriff's sale, but took an assignment of the certificate of purchase. Although Charles O'Brien was one of the administrators of Welch's estate the replication does not base the alleged invalidity of the defendant's title upon the ground that O'Brien could not purchase the property in connection with Heisey, at the sheriff's sale. The point relied upon in this replication is, that Ann McGrevey (Welch) stood in such a fiduciary relation to the estate that she could not purchase the property. She took an assignment, however, from one whose title is not impeached, and notwithstanding her fiduciary relation, acquired as good a title as her assignor.

The demurrer to the plaintiff's replication was properly sustained.

AFFIRMED.

OPINION ON REHEARING.

DAY, J.—Upon the petition of plaintiff, a rehearing was granted upon the 4th point of the foregoing opinion. It is insisted that Ann McGrevey stood in such a fiduciary relation

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to the property in question that she could not acquire a good title, even though purchased from one who could acquire a good title. The authorities cited by plaintiff's attorney do not, as we understand them, sustain this position. The case of *Silverthorn v. McKinster*, 12 Pa. St., 67, is directly in point in support of the opposite doctrine.

That was a case where executors, under a power given to sell lands, sold to one Burns, and Silverthorn, one of the executors, afterward purchased from Burns. The court say: "As then, Burns was, by the sale, invested with an estate recognized by our laws, there was nothing to hinder him from selling and conveying it to whomsoever he pleased. Nor is there anything in the law, or the transaction itself, to prohibit Isaac Silverthorn from becoming the purchaser.

"There is no suggestion of *mala fides* in the sale made by the executors of Burns, and it is clear that, in the absence of fraud, one, who has sold an estate as trustee, may afterwards fairly repurchase it for himself. *Painter v. Henderson*, 7 Barr., 48."

It is further insisted that Ann McGrevy, being found in possession of the title, the burden is thrown upon her to show that she acquired her title from a *bona fide* purchaser. The abstract of title set forth by the defendant in her answer shows that the property in controversy was sold under execution to J. W. Heisey and Charles O'Brien, who assigned the certificate of purchase to Mary McGrath, and she to Ann McGrevy. From the exhibits attached to the replication it appears that Charles O'Brien was one of the administrators of the estate of William Welch, deceased. In *Fleming v. Foran*, 12 Ga., 594, it is held that an executor cannot become the purchaser of land sold under execution against his testator, but that the sale will be set aside on the application of the legatees, provided such application be made in a reasonable time, otherwise the right will be considered waived or abandoned. The reasoning adopted in this opinion is quite satis-

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factory, and the rule established is, we think, the proper one. See also *Spindle v. Atkinson*, 3 Ind., 410.

Under the rule recognized in *Fleming v. Foran, supra*, a purchase by an executor under an execution against his testator is not void, but simply voidable, at the election of the legatees, exercised within a reasonable time. Now, from a reference to the petition in this case, it appears that the execution sale to Heisey and O'Brien is not attacked. No effort is made to set it aside. The petition simply alleges that Ann and Hugh McGrevy had no mortgageable interest in the property, and that the mortgage and the sale pursuant thereto are void, and the petition, referring to the decree of foreclosure of the mortgage, prays that the decree and the proceedings thereunder may be set aside. In the application also, no reference is made to the purchase at execution sale by Heisey and O'Brien. It is simply alleged that Ann Welch by reason of her relationship to the estate and the parties, was incapacitated to acquire a title to the property adverse to the plaintiff. The theory of both the petition and the replication seems to be that, without reference to any illegality in the purchase of Heisey and O'Brien, Ann Welch, stood in such fiduciary relation to the property that she could not through any one acquire a good title to the property. This position we have shown to be incorrect. We need not speculate upon what the result might have been if the plaintiff had alleged the invalidity of the purchase at execution sale by Heisey and O'Brien, and had sought to set that aside. Relief can be granted plaintiff alone upon the case made in her pleadings.

The fact, appearing in defendant's answer, that she acquired title by assignment from Heisey and O'Brien, does not show

^{7. PRACTICE:} her title to be invalid, for the interest acquired by relief limited Heisey and O'Brien was voidable only at the election of plaintiff, and must stand until she asks to have it set aside. The court cannot set aside the sale to Heisey and O'Brien, unless plaintiff asks that relief. The mechanic's

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lien and the judgment thereon being affirmed, it may be that plaintiff would not desire to have the sale set aside and the property resold. Without the setting aside of the sale to Heisey and O'Brien, the plaintiff can have no relief, and the plaintiff nowhere in her pleadings asks this relief. The former opinion is adhered to.

AFFIRMED.

59	531
79	322
59	531
489	484

59 531

131 527

NICKSON v. BLAIR.

1. **Practice: NEGLIGENCE OF CLERK: ACTION DISMISSED FOR.** A motion was made to dismiss plaintiff's action, because the clerk had failed to make a memorandum in the appearance docket of the date of filing the petition, and the court sustained the motion: *Held* properly sustained, under section 200 of the Code, which provides that no pleading of any description shall be considered as filed until such memorandum is made.

Appeal from Humboldt District Court.

WEDNESDAY, OCTOBER 18.

ACTION IN ATTACHMENT. The defendant filed a motion to dismiss the action, which motion the court sustained. The plaintiff appeals.

A. D. Bicknell and Clarke & Farrell, for appellant.

Gurney & Quivey, for appellee.

ADAMS, J.—The motion to dismiss was based upon the fact that no memorandum of the date of filing the petition had been made in the appearance docket.

The provision of statute upon which the defendant relies is in these words: "The clerk shall immediately upon the filing thereof make in the appearance docket a memorandum of the date of the filing of all petitions * * * or paper of any other description in the cause; and no plead-

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ing of any description shall be considered as filed in the cause
* * * until the said memorandum is made.

Code § 200.

The plaintiff insists that this provision is merely directory, and that, where the petition has been lodged in the clerk's office and has been marked filed, as in this case, the plaintiff should not suffer by reason of the clerk's omission to make the required entry in the appearance docket.

The provision may be divided into two parts. In the first part is a provision as to what the clerk shall do, and in the second is a provision as to what shall be the consequence of a failure. If we had only the first part, there would be much force in the plaintiff's position that the statute should be construed as merely directory. But the provision as to the consequence of a failure must be construed according to the plain meaning of the words, and so construing it, it forbids us to say that the effect is the same whether the entry is made or not. *Padden v. Moore*, 58 Iowa, 703.

The plaintiff complains that, if his action is dismissed, he will lose the benefit of his attachment, and that, too, without any fault or negligence upon his part. But the omission of an official duty generally results in an injury to some one, and it is impossible to prevent it. Besides, we are not prepared to say that plaintiff was wholly without fault. It may not be customary for attaching creditors or their attorneys to see that the clerk performs his duty in making the proper entries in the appearance docket, yet they have power to do so.

The case is not different from that of the grantee in a deed recorded but not indexed. The record in such case does not give constructive notice. The grantee's protection can be made certain only by seeing that the recorder performs his duty. *Miller v. Bradford*, 12 Iowa, 14; *Barney v. McCarty*, 15 Id., 510.

The plaintiff insists, however, that, while it may be that the petition could not, under the statute, be considered as filed until the entry had been made in the appearance docket, yet

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the court should not have dismissed the action, but should have directed the entry to be made. But if, as we hold, the court was bound to consider the petition as not filed, there was no alternative for the court but to dismiss the action. Suppose the clerk had made the entry, the petition would be deemed to have been filed when the entry was made. If not made ten days before the term, it would be the duty of the court to treat the case as discontinued. Code, § 2600. We think that the court did not err in sustaining defendant's motion.

AFFIRMED.

BUNCE v. BUNCE ET AL.

1. **Guardian's Sale of Real Estate: DEFECTIVE NOTICE: JURISDICTION.** In a proceeding by a guardian to sell the ward's real estate, there was notice served upon the ward, and, although the service was imperfect, the court found as a matter of record that service had "been duly made as provided by law." *Held*, that the defect in the service of the notice could not be taken advantage of in a collateral proceeding to set aside the title of the purchaser at the guardian's sale. The court was not without jurisdiction, as in the case of no notice.
2. ——: ORDER FOR NOT A JUDGMENT: STATUTES CONSTRUED. A probate order for a guardian's sale is not a *judgment*; and sections 3154 and 3157 of the Code, providing for reversing, vacating and modifying *judgments*, have no proper application to such an order.
3. ——: STATEMENTS IN PETITION FOR. Under the statute which provides that the real estate of a minor may be sold when necessary for his support or education, it is sufficient, to give the court jurisdiction to order the sale, if such necessity is *alleged* in the petition.
4. ——: NECESSITY OF SALE BOND: APPROVAL OF SALE. In a proceeding in probate to sell the real estate of a minor, while it would be error, in the absence of the sale bond required by section 2556 of the Revision, for the court to approve the sale, yet, where jurisdiction has attached, and the sale has been approved, it cannot be successfully attacked in a collateral proceeding by alleging the want of a sale bond.
5. ——: APPROVAL OF SALE AND DEED BY CLERK. Under chapter 86, Laws of 1868, by which the clerk was empowered to keep open court, and transact, in the absence of the judge, all probate business not requiring notice, subject to the supervision and approval of the judge, the clerk was authorized, in the absence of the judge, to approve the sale and deed made by a guardian for the real estate of his ward, and, where the

59	533
88	191
59	533
89	482
59	533
92	641
59	533
121	715
59	533
135	432

Bunce v. Bunce.

clerk so approved the sale and deed, and the judge afterwards approved the guardian's report of sale, held that the approval by the judge of the report must have included an approval of the act of the clerk in relation thereto, and was a sufficient approval by the judge of the sale and deed.

6. **Practice: PARTIES TO CROSS-PETITION.** Where certain mortgagees were interested in the identical matter for which the action was brought, and might have been joined as plaintiffs, it was competent for the defendants to bring them in by cross-petition, that the adjudication respecting their title might be complete.

Appeal from Cerro Gordo Circuit Court.

THURSDAY, OCTOBER 19.

ACTION to set aside a guardian's deed. The plaintiff avers in his petition that, in 1871, he was a minor, and the owner of the land in question; that the defendant, George L. Bunce, made a pretended guardian's sale of the land, and the other defendants claim to have acquired an interest in the land through such sale. The plaintiff avers that the sale was invalid, because there was no sufficient service of notice on him; also, because the petition for the sale was insufficient; also, because no sale bond was given; and finally, because there was no approval of the deed. The defendants denied the material allegations of the petition. They also filed a cross-petition, bringing in certain mortgagees, and asking that a mortgage executed to them by the plaintiff upon the premises be canceled. The court dismissed the plaintiff's petition and entered a decree canceling the mortgage. The plaintiff and the mortgagees appeal.

Brown & Carney, and J. E. E. Markley, for appellants.

Wilber & Sherwin, Stanberry & Clark, and M. L. Schermerhorn, for appellees.

ADAMS, J.—I. The appellants insist that the service of notice of an application for an order of sale was not such as

1. GUARDIAN'S
Sale of real es-
tate: defective
notice: juris-
diction. to give the court jurisdiction. The officer's return upon the notice is in these words: "The within notice served personally on the within named

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minor by reading the within to the within named minor, Simon G. Bunce, and leaving a copy with George L. Bunce, father of the minor, the 5th day of January, 1871." The statute provided that "a copy of the petition with notice of the time at which such application will be made to the court must be served personally upon the minor at least ten days prior to the time fixed for such application." The defect complained of is that a copy of the petition was not served upon the minor. But it is plain to be seen that the case before us is not one of no notice, but of defective service of notice. There being an actual personal service of notice upon the minor, the court was called upon to inspect the return and determine its sufficiency. The court did determine that service had "been duly made as provided by law," and its determination is made of record. Possibly in this the court may have erred, but, if so, it was merely an error subject to be corrected on appeal.

The court was not without jurisdiction, as in a case of no notice. It is true the plaintiff was then a minor, but the rule enunciated was not the less applicable. In *Sharhan v. Loffer*, 24 Iowa, 226, a question was raised similar to the one before us. The person served in that case was a minor. But the court said: "If it appears that there was a notice, though it be defective, or the service thereof be imperfect, neither in strict compliance with the directions of the statute, and the court determine, in favor of the sufficiency of such notice and service, which is shown upon the record, even though such determination was erroneous, the judgment of the court will not be held void in a collateral proceeding. "See the cases cited, and in addition thereto *Dougherty v. McManus*, 36 Iowa, 657; *Woorbury v. McGuire*, 42 Id., 342; *Farmer's Ins. Co. v. Highsmith*, 44 Id., 333. The appellants, however, insist that this is not a collateral, but a direct proceeding instituted under sections 3154 and 3157 of the Code.

The plaintiff's petition is entitled a petition in equity. Twenty-four persons are made defendants. The petition prays,

Bunee v. Bunee.

not simply that the order of sale be set aside, but that the guardian's deed be set aside; that his title be quieted, and the defendants be required to account for the rents and profits. It appears to us that the plaintiff relied in the outset upon the theory that the order was made without jurisdiction, and that he had no occasion to bring himself within the special provisions of the section above cited. We do not propose, however, to rest our decision upon the fact that this proceeding appears to have been designed originally as an action in equity. It is possible that we might deem the plaintiff's petition sufficient to bring him within the sections above cited, though not so designed originally, if those sections are applicable.

But in our opinion they are not. What the plaintiff seeks to vacate is, not a judgment, but a mere probate order for a guardian's sale. The proceeding in which the order was made is, in no proper sense, an adversary proceeding, but a proceeding demanded by the interest of the ward. The application made is solely in the ward's behalf. It is in some sense his own application. It is made by his guardian, selected and appointed by court to act for him, and bound by his oath and his bond to act properly for him, and under the directions of the court. If he is guilty of bad faith or negligence, and thereby involves his ward in loss, he and his bondsmen are liable therefor. These considerations show how different an order for a guardian's sale is from a judgment or order obtained against a ward in an action.

Again, a rule which should give minors a year after attaining their majority to set aside all guardian's sales in which they could show irregularities amounting to error, would evidently be detrimental to the interests of minors in general. It would tend to render purchases at guardian's sales too hazardous to enable the property to be sold for its value.

Upon looking into the statute, we have to say that we do not think that we could give it the construction contended for, without going beyond both its letter and spirit. The plaint-

Bunce v. Bunce.

iff relies upon the 8th subdivision of section 8154. But that provides for vacating a judgment and not an order.

Again, it is certain that the original statute, and that which was in force at the time the sale was made, had no such scope as the plaintiff contends for. When that statute was passed, the court of probate jurisdiction was the county court. The orders which could be set aside under that statute were the orders of the District Court. There was certainly no provision in that statute for setting aside a probate order. The change afterwards made, by which the provision was extended to the Circuit Court, was not such, we think, as to justify us in supposing that the provision was intended to apply to new subject matter. Nor was any change made until the defendant's rights had attached. If they once had a valid title, no new remedy could be provided for the plaintiff by which he could successfully assail it.

II. The next objection made to the validity of the sale is based upon the character of the petition. The statute provides that the real estate of a minor may be sold, when necessary for his support or education. The petition in this case avers such necessity. The appellants contend that the petition should show that the minor's father was not of sufficient ability to maintain and educate him. But the general averment in regard to the necessity of the sale, it appears to us, is sufficient to give the court jurisdiction, and we are inclined to think that the petition would be held sufficient even on appeal.

III. The remaining objections, the want of a sale bond, and the alleged want of approval of the sale, may be considered together. The statute provided that before a sale can be executed the guardian must give security. Revision, § 2556. The statute also required that the sale must be approved. Revision, § 2558. In the absence of a sale bond, it would doubtless be error to approve the sale, but where jurisdiction has attached and the sale has been approved, it cannot, we think, be success-

4. _____: necessity of sale
bond; approval of sale.

Bunce v. Bunce.

fully attacked in a collateral proceeding by alleging the want of a sale bond. The question raised must be deemed to have been passed on, and whether correctly or incorrectly, the court cannot, we think, in a collateral action, inquire.

This brings us to consider whether the sale was approved. The plaintiff contends that it was not, but in our opinion it ~~s. — : ap-~~ was. Upon each deed was indorsed an approval ~~by clerk.~~ of the sale and deed by the clerk of the court. By chapter 86, Laws of 1868, the clerk was empowered to keep open court and transact, in the absence of the judge; all probate business not requiring notice, subject to the supervision and approval of the judge. The approval of a guardian's sale was not business which required notice. The clerk then, we think, was authorized, in the absence of the judge, to approve the sale, subject to the supervision and approval of the judge. The presumption existing in favor of the regularity of the acts of officers would require us to presume that the judge was absent.

Whether we should presume, also, that the action of the clerk was approved by the judge, in the absence of any showing to the contrary, we need not determine. There is in this case some affirmative evidence that it was approved. After the approval by the clerk, the guardian reported the sales to the court, and they were approved. This was of course a sufficient approval so far as the sales were concerned. But it is said by appellants that it does not appear that the judge approved the deeds, and it is said that the sales could not be deemed complete and wholly approved until the deeds had been executed and approved. Their position is based upon the fact that the statute provides that the guardian's deed must be returned into court and the sale approved. It is not to be denied, we think, that there is some ground for contending that the statute contemplated that the deed is to be approved as a part of the sale. But, conceding that the deed should be approved, we think that the approval of the report in this case is sufficient to justify the inference of the approval of the action of the clerk, whose approval embraced the deed as well as sale.

Bunce v. Bunce.

As the clerk was authorized to make the approval subject to the supervision of the judge, such supervision became the duty of the judge. We must presume that the acts of the clerk, made of record upon a paper required to be returned into court, and which acts it was the duty of the judge to supervise, were at least known to the judge. Now if the execution of the deed is to be deemed a part of the sale and is to be approved as a part thereof, we think that the approval of the report, with the knowledge by the judge of the acts of the clerk, must be deemed an approval of his acts. This conclusion is strengthened by the fact that no objection appears to be made to the deeds as such. The plaintiff's objections are solely to the sale. If those objections are not valid, the execution of proper deeds, such as these appear to be, would be a formal matter. We think that we are fully justified in holding that the sale was approved, including the execution of the deeds.

The mortgagees complain of the action of the court in canceling the mortgage. It is insisted that the cancellation of the mortgage was not proper subject matter to be adjudicated upon a cross-petition. But it appears to us that it was. The mortgagees are interested in the identical matter for which the action was brought. They might have joined as plaintiffs. Not having done so, we think it was competent for the defendants to bring them in by cross-petition in order that the adjudication respecting their title might be complete.

AFFIRMED.

59	540
113	495
59	540
116	86
59	540
142	153

BRITTON ET AL v. D. M., O. & S. R. Co.

1. **Parties: RIGHT TO JOIN GIVES NO RIGHT TO BE SUBSTITUTED.** Section 2683 of the Code, which gives to any one interested in the subject-matter involved in the action the right to *unite with* the defendant in resisting the claim of the plaintiff, does not give to such interested person the right to be *substituted for* the defendant.
2. **Practice: DIRECTIONS OF COURT TO WITNESS.** It is not improper for the court, on its own motion, to indicate to a witness what matters should be considered in answering a question, nor, when objections are made to questions asked a witness, to state what the court deems the proper course to be taken.
3. **Railroads: RIGHT OF WAY: MEASURE OF DAMAGES.** On an appeal from the award of a jury for damages for right of way, where the question was much longer than necessary, but asked, in substance, how much less the land was worth after than before the appropriation, excluding benefits, *held* not erroneous.
4. **Practice in the Supreme Court: ERROR WHICH MIGHT HAVE BEEN CORRECTED BELOW.** Where it appeared on cross-examination that a witness, on the examination in chief, took into consideration improper matters in estimating damages, defendant should have moved the court to strike out the objectionable evidence before asking this court to correct the error.
5. **Railroad: RIGHT OF WAY: MEASURE OF DAMAGES.** In estimating the damages which the owner of land should recover on account of the appropriation of a portion thereof for right of way for a railroad, the benefits caused to the land by drainage from the building of the railroad cannot be considered. Section 18, Article 1, of the Constitution excludes the consideration of *all* advantages that may result to the owner on account of the improvement.

Appeal from Warren Circuit Court.

THURSDAY, OCTOBER 19.

THE defendant instituted proceedings to condemn a strip of land seventy-five feet wide as right of way for its road over certain real estate belonging to the plaintiffs. From the award of the sheriff's jury the plaintiffs appealed to the Circuit Court, where there was a trial by jury, verdict for the plaintiffs, and judgment as provided by statute. The defendant appeals.

Britton v. D. M., O. & S. R. Co.

Seevvers & Samson, for appellants.

Henderson & Berry, for appellees.

SEEVERS, CH. J.—I. John Felton and others filed a petition in the Circuit Court stating they were the real parties in interest, because they had obligated themselves to procure the right of way for the defendant, and they moved the court to substitute them as defendants, to the end that they might make defense to plaintiff's claim.

This motion and petition was striken from the files. This ruling is assigned as error, and section 2683 of the Code is relied on. That section recognizes the right of any one interested in the subject-matter involved in the action to "unite with the defendant in resisting the claim of the plaintiff." Possibly, under the showing made, Felton and others were entitled to such relief, if they had asked it. This they did not do, but went much farther, and asked to be substituted as defendants to the action. This could only be done by striking out the present defendant. The effect of this would have been to compel the plaintiff to look to Felton and others for the satisfaction of any judgment that might be obtained. For this there is no warrant in the statute, and the court did not err in the respect named.

II. During the trial, counsel for the plaintiff propounded certain questions to witnesses introduced by them. To such questions objections were made. The court did not either sustain or overrule such objections, but stated to counsel what the court regarded as the correct question or inquiry, and, at another time, after the witness had commenced answering a question, the court interposed and stated to the witness the matter which could properly be taken into consideration in answering the question.

It is not objected the court erred as to the law of the case in making the suggestions, but it is said the "instructions and modifications undertaken by the court tended to mislead and confuse the witness, and indicated to the jury, who sat as at-

Britton v. D. M., O. & S. R. Co.

tentive observers, a favoring of one of the parties to the litigation." In this we cannot concur. On the contrary, we think the court is something more than a mere figure head, and that it is the duty of the court to earnestly and intelligently, with due regard to the rights of the parties, press the trial of a cause to as speedy a conclusion as possible. To this end, it is right and proper for the court, when objections are made to questions asked a witness, to state what the court deems is the proper course to be taken. Nor is it improper for the court on its own motion to indicate to a witness what matters should be considered in answering a question. The court is not bound to sustain or overrule an objection asked a witness, without a reason; and substantially all the court did was to state his views as to what was the proper course to be taken. We cannot say that anything said by the court was improper, and do not believe the defendant was thereby prejudiced in the mind of any juror.

III. Counsel for the plaintiffs asked several witnesses the following question:

"State to the court what, in your opinion, is the difference in value of Mr. and Mrs. Britton's land as it was before the location and construction of the line of railroad through it, and as it is since the location and construction of this line of railroad through the land, taking into consideration the fact that the railroad has taken and used for its own, a strip of ground seventy-five feet in width from the point where it enters the farm to where it leaves the farm of Mr. and Mrs. Britton, without considering the benefit which may accrue to Mr. and Mrs. Britton by reason of the construction of the road in the community; basing your opinion of the difference in value, if there is any difference, upon the damage caused by the appropriation of the land and the construction of the road-bed of the railroad company through the farm."

It is said this question is erroneous, because the true inquiry is "what was the fair marketable value of this property, over which the defendant appropriated its right of way, im-

Britton v. D. M., O. & S. R. Co.

mediately prior to such appropriation, then how much was such value reduced by such appropriation." We think the question asked was calculated to elicit just such evidence as that indicated by counsel as being proper. The question is much longer than was necessary, but in substance the witnesses were asked how much less the land was worth after than before the appropriation, excluding benefits. It is said that one witness, at least, took improper matters into consideration in estimating the damages, when answering the foregoing question. Conceding this to be so, such fact appeared or was shown on cross-examination of the witness, and no motion was made to strike out the evidence because of the fact so elicited. We cannot correct the wrong, conceding there was one, because the court below was not asked to do so.

IV. The plaintiff asked a witness the following question: "State what effect the construction of the grade of this railroad through this land has upon that portion which is low and sometimes wet—whether or not it injures it." An objection to this question was overruled, and the witness answered: "I think it had a tendency to back water upon it." If we understand counsel, it is claimed the question and answer are objectionable, because the tendency of the evidence was to permit a recovery because of the faulty construction of the road. We do not think any such thought is contained in either the question or answer. If because of the construction of the road the land was made more wet than it otherwise would have been, this fact should be considered in estimating damages, and this was all the plaintiffs sought to prove. As they did not seek to show they were damaged because of the improper construction of the road, the court properly refused to permit the defendant to interrogate witnesses in relation thereto. If it appeared on cross-examination that any of the witnesses based their estimate of damages wholly or partially on the improper construction of the road, the defendant, on the theory on which the case was

Britton v. D. M. O. & S. R. Co.

tried, should have moved the court to strike out such evidence before we can be asked to correct the error, if it was one.

V. In the fifth paragraph of the charge the court, in substance, instructed the jury that all benefits should be excluded in estimating the damages, including drainage, caused by the construction of the road, and that evidence touching the drainage had been admitted as tending to show the quality of the land, and not for the purpose of showing it had been benefited by the construction of the road. This instruction is objected to, and it is said the benefits that are not to be considered are the conveniences and advantages resulting from the construction of the road, and that the damages should be based on the market value of the land before and after construction. The argument, therefore, is, that if the value of the land has been increased by the construction of the road, this should be considered and the damages reduced because of such fact. It seems to us this argument is not sound, because section 18 of Article 1 of the Constitution provides that the jury "shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken." This includes all benefits and advantages—none are excluded. We think the instruction correct.

It is said the verdict is not sustained by the evidence, but we think it is.

AFFIRMED.

Eckert & Williams v. Pickel.

ECKERT & WILLIAMS v. PICKEL.

59	545
85	455
59	545
108	600
59	645
110	88

1. **Practice:** CERTIFYING QUESTIONS IN CASES INVOLVING LESS THAN \$100. In cases involving less than \$100, the statute does not contemplate that *abstract* questions of law shall be certified to this court, but such questions only as are decisive of the case; and such only will be considered.
2. **Promissory note:** AVOIDED BY INNOCENT ALTERATION: NEW ACTION FOR ORIGINAL CONSIDERATION: RETURN OF VOID NOTE: FORMER ADJUDICATION. Where, in an action on a promissory note, the defendant alleges as his defense that the note was *fraudulently* altered in a material point after delivery without the knowledge or consent of the maker, *held*.
 - 1st. That the material alteration, though innocently made, was sufficient to avoid the note, and that the allegation of fraud was neither necessary nor material.
 - 2d. That a general verdict and judgment for defendant on the issue made by such answer were not an adjudication that the alteration of the note was *fraudulently* made.
 - 3d. That such verdict and judgment were not a bar to a subsequent action for the consideration for which the note was given.
 - 4th. That such subsequent suit could be maintained without returning or offering to return the void note.

Appeal from Worth Circuit Court.

THURSDAY, OCTOBER 19.

THIS is an action to recover part of the purchase price of a grain seeder which the defendant bought of one Sheldon, who sold the same as the agent of P. P. Mast & Co. Two promissory notes in the sum of forty dollars each were given for the seeder, payable on the first day of October 1877 and 1878 respectively. The notes were indorsed to P. P. Mast & Co., and the one which became due October 1, 1877, was paid.

Suit was brought upon the other note, and the defendant set up as a defense that the note had been fraudulently altered by changing the time of payment from 1878 to 1876. There was a trial by jury on that issue and a verdict was returned for the defendant.

Eckert & Williams v. Pickels.

Afterwards P. P. Mast & Co. assigned the claim and cause of action for the purchase-price of the seeder to Eckert & Williams, and they brought this action to recover the same, and they allege that the note was altered innocently, and without any fraudulent intent. The defense relied upon was that, as it had been adjudged in the former action that the note had been fraudulently altered, no recovery could be had for the consideration for which the note was given. There was a trial by jury and verdict and judgment for the plaintiffs. Defendant appeals.

Miller & Cligett, for appellant.

Pickering & Hartley, and *L. S. Butler*, for appellees.

ROTHROCK, J.—I. The controversy involves less than \$100, and the trial judge has certified to us certain questions of law which he states it is desirable shall be determined by this court. They are as follows:

1. “Where, in an action on a promissory note the defendant in his answer alleges, as a defense, that the note was fraudulently altered after delivery, without the knowledge or consent of the maker, and a general verdict and judgment are rendered for defendant in that case, will this judgment and adjudication be a bar to an action for the consideration for which the note found void was made?

“2. When, in an action on a promissory note, judgment is rendered for defendant in consequence of a material alteration of the note, and an action is commenced against the maker of the note for the consideration for which the note was given, and in this action the defendant alleges as a defense that the note that was given for the claim was fraudulently altered, is the burden of proof on plaintiff to show that the alteration was made in good faith, or upon defendant to show that the alteration was fraudulent?

“3. Where, in defense to an action on a promissory note, defendant alleges in his answer that the note was fraudulently

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altered after its execution without the knowledge or consent of defendant, and a general verdict and judgment are in favor of defendant; are such verdict and judgment an adjudication that the alteration of the note was fraudulent?

“4. If in a suit on a promissory note against the maker the same is adjudged void on the ground of a material alteration, can the holder of said note maintain a suit on the original consideration of the note, without returning, or offering to return, said note?

“5. When, in an action on a promissory note, the answer alleges that the note has been altered after its execution in a material matter, is the further allegation that said alteration was fraudulently made a necessary or material alteration?

“ROBERT G. REINEGER, Judge.

“Dated April 14, A. D. 1882.”

The second question above set out we do not feel called upon to determine. The verdict and judgment were for the plaintiff, and the court instructed the jury that the burden was on the plaintiff to show that the note was not fraudulently altered. Whether this was right or wrong, it cannot affect the case. The defendant cannot complain because the instruction was favorable to him, and if we were to hold that the burden of proof was upon him, it would not reverse the case. The statute does not contemplate that abstract questions of law shall be certified to this court. Only such questions as are decisive of the case should be certified.

II. The first, third and fifth certified questions involve the real point in controversy in the case, and they may be considered together. They involve but the one question, which is, whether or not the cause of action upon the consideration for which the note was given, was adjudicated in the action upon the note.

This court has adopted the rule that any material alteration of a promissory note by the holder thereof avoids the note, and no action can be maintained thereon, even though the alteration be made innocently, and without any fraudu-

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lent intent. *Murray v. Graham*, 29 Iowa, 520; *Kranse v. Meyer*, 32 Id., 566; *Morrison Bros., v. Huggins*, 53 Id., 76. An examination of the case of *Robinson v. Reed*, 46 Id., 219, will show that, while it is there said that a material alteration with a fraudulent intent will defeat a recovery on the note, it is not determined that it is necessary to show that the intent was fraudulent. The question here presented was not in that case. And some of the above cited cases hold that a material alteration so made will destroy the note, but leave the party to recover upon the original consideration. The alteration in this case was a material one. It changed the time of payment of the note two years.

It is claimed by counsel for the defendant that, because the answer in the suit upon the note charged that the alteration was fraudulently made, no recovery can be had in this action, for the reason that the issue of fraud was made and determined in the former action; and this is the controlling question in the case.

The rule that what has once been judicially determined shall not again be made the subject of judicial controversy, or that a person shall not be twice vexed for the same cause, is not of easy application in practice. The difficulty lies chiefly in determining whether or not the matter in dispute was decided in the former action. As has been seen, it was not a material question in the former action whether or not the note was fraudulently altered. It was not necessary, in order to sustain the plea of alteration, that it should have been shown that there was any fraudulent purpose in making the alteration. Indeed, the defendant could, and we must presume he did, stand upon his legal right, and claim his discharge from the mere fact of alteration, and we must further presume that the court instructed the jury that the question of fraud was not material. In this view of the case, the character of the action in regard to fraud was neither put in issue nor was it determined in the former case. If the court instructed the jury that it was necessary to find that the al-

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teration was fraudulent, the instruction was wrong, and we will not presume that such an instruction was given, but rather presume that the instructions were correct expositions of the law. And this rule we think is not contrary to any adjudged case which has been cited by counsel, nor to any case which we have been able to find in quite an extensive search made for that purpose. In order to constitute a former adjudication, it must affirmatively appear that the matter in dispute was put in issue and tried. In *Schmidt v. Zahndorf*, 30 Iowa, 498, the action was for the recovery of real property, and for rents and profits. The court below decided that the plaintiff was entitled to the property, but, as no evidence was introduced as to the value of the rents and profits, the judgment did not cover that issue. It was held on appeal that this was erroneous, because, as the claim was embraced in the issues and not withdrawn, but submitted to the court, it was the right of the defendant to have it determined, and not to be called upon again to defend against it. In the case of the *Packet Co. v. Sickles*, 5 Wall., 580, it is said: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties * * * ." In the dissenting opinion in that case it is said: "The rule, as I understand it, is that to render such former judgment conclusive it is only necessary to show that the same matter might have been decided, and actually was decided." Again it has been said that "not only is the judgment of a court conclusive on all questions actually and formally litigated, but likewise as to all ques-

Foreman v. Hunter.

tions within the issue joined and the determination of which is necessarily included in the judgment." Wells on *Res Adjudicata*, section 217.

The record in the former suit, as we have seen, did not necessarily require the question of fraud to be determined, and it could not have been determined without the trial of an immaterial issue. Our conclusion is that the question now under consideration should be answered in the negative, and as the instructions of the court to the jury are in accord with our views herein expressed, we find no error therein.

III. As to the fourth question certified, we think it should be answered in the affirmative. The note had been adjudged void. The adjudication was a complete protection to the defendant against any attempt to enforce the note. Besides, it is questionable whether, if such defense had been available, it should not have been set up by way of answer, demurrer or motion, in arrest of judgment.

AFFIRMED.

FOREMAN v. HUNTER, SHERIFF.

1. **Alien Jurors: VERDICT BY, VOIDABLE, NOT VOID.** A verdict rendered by a jury, two of whose members were aliens, is erroneous but not void. It might be reversed on appeal, but it cannot be disregarded as a nullity.
2. **Criminal Law: SELLING INTOXICATING LIQUORS: INFORMATION.** In an information for selling intoxicating liquors, it is not necessary to set forth the kind of liquor sold.
3. **Judgment: BIASED COURT: NOT VOID.** Where a justice had enough of feeling in a case to contribute to a fund for the procurement of a witness for the prosecution, while it was very reprehensible for him to try the case, yet, as he was not a party to, and does not appear to have had any pecuniary interest in, the case, his judgment is not void.

Appeal from Jasper District Court.

THURSDAY, OCTOBER 19.

THE plaintiff filed a petition praying for his discharge, upon a writ of *habeas corpus*, from the Jasper county jail. The

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writ of *habeas corpus* was duly issued and upon the hearing the court refused to discharge the petitioner. The plaintiff appeals.

Winslow and Wilson, for appellant.

Smith McPherson, Attorney-general, for appellee.

DAY, J.—The evidence upon which the case was heard is not before us.

The petition in substance alleges that the imprisonment and restraint of the plaintiff are by virtue of a mittimus issued by one J. L. Johnson, a justice of the peace in and for Jasper county, upon a judgment of conviction upon seventeen counts in an information charging the petitioner with the sale of intoxicating liquors; that the judgments entered upon every count of the information are void, and, the imprisonment is illegal, for the following, among other reasons:

First. Two of the jury which tried the cause were not citizens of the United States, which fact was not known to petitioner until after the verdict was rendered.

Second. The said judgments and each of them, except the one entered upon the fifth count in the information, are wholly void, because the matters and things alleged in said counts do not constitute any violation of any statute of the State.

Third. That a witness was hired and paid the sum of twenty-five dollars to testify in said cause against petitioner, which sum was made up by subscription or donation, and that among the said contributors was the said J. L. Johnson, who was the court that tried the case. The petitioner further alleges that the justice fixed the appeal bond at thirty-five hundred dollars, which is excessive and oppressive, and in violation of the Constitution of the State.

The court upon the hearing of the cause found that the allegations in the plaintiff's petition are true, except in relation to the information upon which petitioner was tried, respecting which the facts are as follows: "Each of the several counts, except the fifth, was in the following words, that is to say:

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"And the defendant is further accused of the crime of selling intoxicating liquors. For that the defendant did, at the town of Newberg, in Jasper county and State of Iowa, on or about the 29th day of October, A. D. 1881, sell to Fred Simpson, a person then and there being, intoxicating liquors, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Iowa.

"That the fifth count charged the sale of whisky, and defendant has been imprisoned, as he alleges, more than the time fixed as the penalty for said offense charged." Upon these facts the court held as a matter of law that the judgments upon the several counts are not void, but that the bail fixed upon appeal is excessive. The court thereupon dismissed the writ of *habeas corpus*, and reduced the bail, upon appeal, to two hundred dollars.

I. It is insisted that the judgments are void because two of the jurors trying the cause were aliens. It may be conceded that it is the duty of the State, as claimed by appellant, to put legal jurors in the box to try a cause. A judgment rendered by a disqualified jury is erroneous, but not void. It might be reversed upon appeal, but it cannot be disregarded as a nullity. In Cooley's Constitutional Limitations, second edition, page 410, it is said: "Even the denial of jury trial, in cases where that privilege is reserved by the Constitution, does not render the proceedings void, but only makes them liable to be reversed for the error."

II. It is claimed that no valid judgments can be entered upon any of the counts of the information except the fifth, because they simply charge the defendant with selling intoxicating liquors. The objection made to these counts of the information is, that they do not set forth the kind of liquor sold. It is said that "if it was charged that whisky was sold, or any other liquor which *ex vi termini* showed that the sale of it was prohibited, we concede it would have been sufficient, however defectively it might have been alleged."

It is further said: "The various counts in the information,

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except the fifth, in substance charge the defendant with selling intoxicating liquors, and that is all. These words charge no offense. One may lawfully do this. No statute prohibits it, and no support is given it by adding that it was done contrary to the statute." We cannot concede the correctness of this position of counsel. The provisions of the statute upon this subject are very plain. Section 1542 of the Code declares it to be a misdemeanor for any one to own or keep, or be in any way concerned, engaged or employed, in owning or keeping any intoxicating liquor with intent to sell the same in this State in violation of the provision of the chapter in which the section is found. Section 1555 of the Code provides that wherever the words intoxicating liquors occur in this chapter, the same shall mean alcohol and all spirituous and vinous liquors. Section 1549 of the Code provides that, in any indictment or information arising under this chapter, it shall not be necessary to set out exactly the kind or quantity of intoxicating liquors manufactured or sold. Under these provisions of the statute, it seems very clear to us that these counts in the information charge an offense.

III. It is claimed that the judgment is void because of the interest of the justice.

Where a judge is a party, or has a pecuniary interest in the result of a suit, a judgment rendered by him is void. See Cooley's Constitutional Limitations, second edition, pages 410, 413, and authorities cited. It does not appear, however, that the justice who tried this case had any pecuniary interest in the result. He simply contributed to a fund raised to procure a witness to testify in the case on behalf of the prosecution. This certainly would have been ground for a change of venue, if the defendant had insisted upon it. It was very reprehensible for the justice to try a cause in which he had enough of feeling to contribute to a fund for the procurement of witnesses. Still we are of the opinion that this judgment cannot be regarded as a nullity. The petition for the writ of *habeas corpus* does not allege that these facts were unknown to the defendant at the time of trial.

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He might have applied for a change of venue; or, if the judgment entered against him was unjust, he might have appealed, and thus corrected the error. The judgment of the District Court is, we think, correct.

AFFIRMED.

BLAIR V. BOESCH ET AL.

59 554
112 578

59 554
127 610

1. **Highway: RE-SURVEY OF: OBJECT OF STATUTE.** Section 964 of the Code does not authorize the board of supervisors to cause a highway to be re-surveyed, when the line of road, as originally surveyed and established, can be traced on the ground by the recorded field notes thereof.
2. **— : — : OBJECT OF: EVIDENCE.** When such re-survey was made, it was competent for the board of supervisors, in considering it, to hear parol evidence as to where the original survey was actually made, and upon being satisfied that the re-survey was upon the line as originally surveyed, to approve and confirm the re-survey. The very object of a re-survey is to ascertain the location of a road already established.
3. **— : — : LIMIT OF AUTHORITY OF SUPERVISORS.** The statute authorizing the re-survey of public roads makes no provision for a survey to establish highways acquired by the public by prescription; and it was not within the power of the board of supervisors to vary the line of road as originally surveyed, by taking evidence of adverse possession and user. BECK, J., dissenting.

Appeal from Des Moines Circuit Court.

THURSDAY, OCTOBER 19.

THIS is a proceeding in *certiorari* by which it is sought to annul the action of the board of supervisors in approving and confirming a re-survey of a public road. Upon a trial in the Circuit Court the proceedings before the board of supervisors were held to be authorized by law, and the plaintiff appeals.

J. C. Power and Geo. Robertson, for appellant.

Hall & Huston, for appellee.

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ROTHROCK, J.—I. The law under which the re-survey was made is found in section 964 of the Code, and is as follows: “When by reason of the loss or destruction of the field notes of the original survey, or in cases of defective surveys or record, or in cases of such numerous alterations of any highway since the original survey that its location cannot be accurately defined by the papers on file in the proper office, the board of supervisors of the proper county may, if they deem it necessary, cause such highway to be re-surveyed, platted and recorded as hereinafter provided.” The question to be determined, is, whether the re-survey complained of was authorized by this section of the statute. The facts as they appear in the record are, that a public road was established in the year 1856, and the survey and field notes thereof were filed and recorded. By these field notes it appears that the initial point of the road was at the south-east corner of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 20, township 72, range 2 west, and the calls are by course and distance, and do not seem to correspond with the lines of the government surveys, and do not mention stakes or monuments, excepting the terminus of the survey is named as being at “the south-east corner of the old college lot at Kossuth.” It does not appear that these recorded field notes are so obscure, repugnant, or otherwise defective, that they cannot be traced upon the face of the earth. On the contrary, the bill of exceptions shows that it was conceded upon the trial “that a line of road as originally surveyed and established could be traced by the field notes on the ground.” It is claimed, however, that the original survey as shown by the field notes does not correspond with the route as actually surveyed and marked upon the ground by the surveyor, and upon the hearing before the board of supervisors, evidence was introduced which established that fact to the satisfaction of the board.

It is claimed that as the record showed the road was origi-

Blair v. Boesch.

nally established upon the line designated by the field notes and survey, no change could be made therein by 2. ____: ____: parol evidence showing that the survey was actu-object of : evi-
ally made upon a different line. It is a general rule in all questions of disputed lines of surveys that course and distance must yield to actual monuments fixed and recognized by the survey. And this is upon the principle that the establishment of the actual line as surveyed and measured upon the ground is the object always to be attained in controversies of this character. We think, then, it was competent for the board to hear evidence as to where the survey was actually made, and, upon being satisfied from the evidence that the re-survey was upon the line as originally surveyed, to approve and confirm the re-survey. The very object of a re-survey is to ascertain the location of a road already established. *Carey v. Weitgenant*, 52 Iowa, 660.

II. The board of supervisors also received parol evidence tending to show that the line of road as established by the 3. ____: ____: re-survey (and as we understand the record at the limit of au-place in the line of which plaintiff complains), had thority of supervision. been changed by adverse possession and use for more than ten years, and, under that evidence, the re-survey was made to correspond with the use.

It is urged that it is not within the power of the board of supervisors to vary the line of road as originally surveyed by taking evidence of adverse possession and user. This claim of the plaintiff we believe to be correct. The statute authorizing a re-survey of public roads makes no provision for a survey to establish highways acquired by the public by prescription. It is a re-survey which is authorized, and not an original survey to determine public rights acquired by user and adverse possession. It is claimed that, in proceedings under a re-survey, public rights by prescription may be established under the clause in section 964 of the Code, which authorizes a re-survey "in cases of such numerous alterations of

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any highway since the original survey that its location cannot be accurately defined by the papers on file in the proper office." We think the alterations here referred to have reference to such changes in the road as have occurred by orders or surveys made after the original survey, and which tend to such confusion that the location of the road is not accurately defined or pointed out by the record. In the case at bar there has been no alteration of the location of the road by any subsequent action of the proper authority.

It seems clear to us that if the legislature had intended that, in this proceeding to re-survey public roads, rights by prescription and user should be determined, which in many cases are very important, and not easily and readily solved, language would have been used which would unmistakably confer the power. We are not prepared to hold that the power of eminent domain can be exercised in any such a summary manner as is provided for in the law authorizing the *re-survey* of public roads. The only inquiry in such case is, does the re-survey properly locate the road, as it was located in the original survey, and any subsequent alterations which have been made. In our opinion the action of the board in authorizing and approving a deviation from the location as recorded or as actually surveyed was wrong. It will be remembered we determine nothing as to the ultimate rights of the parties, but merely hold that the action of the board was not warranted under the special proceedings provided by the statute.

REVERSED.

BECK, J., *dissenting*.

Taylor v. Trulock.

TAYLOR ET AL V. TRULOCK ET AL.

- 50 558
81 44**
1. **Judicial Sale: SPECIAL EXECUTION: DUTY OF SHERIFF TO FOLLOW DEFENDANT'S PLAN OF DIVISION.** Section 3088 of the Code which provides that "at any time before 9 o'clock A. M. of the day of the sale, the defendant may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell according to said plan so much of the land as may be necessary to satisfy the debt and costs, and no more," applies to sales under *special* as well as under *general* executions.
 2. **DEFENDANT'S PLAN OF DIVISION: DEFINITENESS OF.** Where the plan of division furnished the officer by the defendant, under section 3088 of the Code, is such as to be easily intelligible to a person acquainted with the land, and is certain in the sense that it can be made certain, the officer should not disregard it.

Appeal from Des Moines District Court.

THURSDAY, OCTOBER 19.

THIS action was brought to foreclose a mortgage. A decree of foreclosure was rendered, and a special execution was issued. Before the sale the defendants delivered to the sheriff a plan of division of the land and demanded of him that he sell in accordance therewith. This he refused to do, and sold in a manner different from the plan, and the plaintiffs became the purchasers. The defendants moved to set aside the sale upon the ground that it was not made in accordance with the plan as they demanded. The court sustained the motion. From the ruling sustaining the motion the plaintiffs appeal.

J. & S. K. Tracy, for appellants.

T. J. Trulock, for appellees.

ADAMS, J.—Section 3088 of the Code provides that "at any time before nine o'clock A. M. of the day of the sale, the defendant may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case the officer shall sell according to said plan so much of the land as may be necessary to satisfy the debt and costs, and no more."

**1. JUDICIAL
sale : special
execution :
duty of sheriff
to follow de-
fendant's
plan of divi-
sion.**

Taylor v. Trulock.

The plaintiffs contend that in this case the officer was justified in disregarding the plan—*first*, because the sale was upon special execution, and, *second*, because the plan was not sufficiently definite.

The first question presented then is as to whether the statute was designed to apply to sales on special execution. In support of the plaintiffs' position that it was not, they cite *Malony v. Fortune*, 14 Iowa, 417. In that case Baldwin, Ch. J., referring to a corresponding provision in the Revision, section 3319, and also sections 3267, 3268 of the Revision respecting the duty of the officer to sell only so much of the property as is necessary to satisfy the debt and costs, said: "These provisions, we think, apply in sales under general executions." But when we look into the case we see that the question involved did not necessarily call for a construction of section 3319 of the Revision respecting the right of the execution debtor to demand that the sale should be made according to a plan of division offered by him.

In that case the decree provided that the mortgaged property should all be sold. The defendants appealed from the decree, insisting that it was error to order all the property to be sold, inasmuch as the debt and costs might perhaps be satisfied by a sale of a part. The plaintiffs, the appellees, insisted that the defendants were not prejudiced, because the officer was not bound to obey the decree so far as it provided for selling the whole property, unless necessary, and they gave as a reason why the officer was not bound to obey the decree that the statute expressly provided that the officer should sell only so much as should be necessary; and the statute relied upon consisted of the sections above cited, one of which pertained to the mode of selling where a plan of division is offered.

The learned judge said that these provisions apply to sales on general executions. He did not say that they could not apply to sales on special executions. His thought doubtless was, that the provisions have their special efficacy in sales on general executions, because in such sales the statute constitutes

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the officer's sole guide. In the case of a foreclosure, the decree and special execution should direct the sale of only so much of the property as shall be found to be necessary. Where they do so direct, he need not look beyond them to find the same direction in the statute.

The real ground for holding the decree erroneous in *Malony v. Fortune* was that it contravened section 3661 of the Revision, and had the effect, as the court thought, to control the officer, and compel him to sell the whole property whether necessary or not. Conceding that this would be so, it does not follow that in the case at bar the execution defendants might not require the officer to sell according to a plan of division furnished by them. The decree of foreclosure is not set out, but we must presume that it conformed to section 3321 of the Code, and did not direct absolutely the sale of the whole property. The special execution was in the usual and proper form, directing the sale of so much as should be necessary. The argument, then, that section 3088 of the Code cannot be applied to this case, because it would require the officer to disobey the decree, is not, in our opinion, sound; nor do we think that *any* objection, which is sound, can be urged to the application.

We come next to consider the objection that the plan of division offered is not sufficiently definite. The plan of division
2. ____: plan
of division:
definiteness
of. is shown for the most part by a plat. We cannot very well set out a copy of the plat and go into a detailed examination of it. It refers to a portion of the land in a very general way as the north fifty acres of the timber land, also lot 1, _____ acres south of railroad etc. To a stranger the land described in the plan of division would not necessarily appear to be identical with the land mortgaged. But it is not objected that it is not; and we have no doubt that to a person acquainted with the land the plan of division was easily intelligible, and that it was sufficiently certain in that it could be rendered certain.

No objection appears to have been made, nor is it shown

Phelps v. Winters & Hill.

to us that the officer, in the exercise of reasonable diligence to discharge his duty, could not have made a sale in accordance with the plan. We think that the court did not err in setting aside the sale.

AFFIRMED.

PHELPS v. WINTERS & HILL ET AL.

1. **Chattel Mortgage: TRANSFER OF MORTGAGOR'S INTEREST: PRIORITY OF CLAIMS UPON.** Where the sheriff had possession of a stock of goods for the purpose of selling the same under a chattel mortgage, and before the sale, a writ of attachment in a suit against the mortgagors was placed in his hands, which he levied on the goods subject to the mortgage, and the suit proceeded to judgment, and a special execution issued therein which was also placed in the sheriff's hands and by him levied on the goods subject to the mortgage, and it was then agreed by, and between the mortgagors, the mortgagees and the attaching creditors, that the goods should be sold in bulk under the mortgage, the mortgage satisfied, and the residue applied on the attachment, and the goods were sold accordingly, but before the payment of the purchase money, the sheriff was garnished at the suit of plaintiff against the mortgagors: *held*, that the agreement between the mortgagors, the mortgagees and the attaching creditors operated as a transfer of the mortgagor's equity of redemption, and took priority over the subsequent garnishment of the plaintiff.

Appeal from Cass District Court.

FRIDAY, OCTOBER 20.

THIS is a controversy between the plaintiff and W. H. Applegate & Co. as to their right to priority as creditors of the defendants, Winters & Hill, in a certain balance of the proceeds of a stock of goods which were taken and sold on a chattel mortgage. There was a demurrer to the petition of intervention of W. H. Applegate & Co., which was sustained, and they appeal.

A. S. Churchill, for appellant.

Chapman & Chapman, for appellees.

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Phelps v. Winters & Hill.

ROTHROOK, J.—It appears that the stock of goods of Winter & Hill was in the possession of one Mullins, who was the sheriff of Cass county, and was held by him for the purpose of foreclosing a chattel mortgage thereon in favor of Rutt & Milner. While the goods were thus in the hands of the sheriff, Applegate & Co. commenced an action in attachment before a justice of the peace against Winters & Hill, and the attachment was by the sheriff levied upon the goods, subject to the chattel mortgage. The case proceeded to judgment, and special execution was issued and delivered to the sheriff, and he levied the same on the goods subject to the chattel mortgage. The property was sold in bulk under the mortgage, and for more than enough to satisfy the same. After the sale but before the payment of the purchase money, the plaintiffs commenced an action against Winters & Hill, and garnished the sheriff, claiming that the balance of the purchase money which was to come into his hands was liable to be attached as money coming to Winters & Hill.

The intervenors, in addition to the above facts, set forth in their petition the following: "That prior to said sale it was agreed by Winters & Hill and intervenors and Rutt & Milner that the property should be all sold under the chattel mortgage in bulk, and the mortgage first paid, and the balance applied on the other attachments in the order of levies," and that this was known to the plaintiff at the time of his attachment. The main ground of the demurrer was that Winters & Hill had no interest in the stock of goods subject to the levy of intervenors' attachment, there being a chattel mortgage thereon then unsatisfied.

In *Doane & Co. v. Garretson*, 24 Iowa, 351, it was held that the mortgagor of chattels has an equity of redemption therein, even after condition broken, and that a mortgagee who has taken possession of the property after such breach is liable to garnishment at the suit of a creditor of the mortgagor for any surplus remaining after the payment of the mortgage. Since that decision was made, we believe the usual

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practice has been to reach the surplus in such cases by garnishment. But in the case of *Gimble, Florshime & Co. v. Ferguson, garnishee*, 58 Iowa, 414, it was held that the equity of redemption of a mortgagor of chattels would pass to an assignee for the benefit of creditors and that such assignee cannot be held as a garnishee of the defendant in a proceeding instituted subsequent to the assignment. Upon the same principle the agreement made in this case by Winters & Hill with Applegate & Co., and Rutt & Milner, the mortgagees, that the property should be sold in bulk and the balance applied upon the attachments, operated as a transfer of this equity of redemption of the mortgagor, and took priority over the subsequent garnishment of the plaintiff. We can see no good reason why such an agreement should not be sustained, and we think the court erred in sustaining the demurrer.

REVERSED.

LOWER v. C., B. & Q. R. COMPANY ET AL.

GRAY v. THE SAME.

ELDER ET AL. v. THE SAME.

1. **Railroads: SURMOUNTING LEGAL IMPEDIMENTS THROUGH AUXILIARY COMPANY: NO FRAUD.** Though a railroad company may not for some reason have the legal authority to condemn right of way for a lateral line, it may cause another company of its own stockholders to be so organized as to have that power, and when such subsidiary company has condemned the right of way, it may lease its line to the former company, and in this there will be no fraud upon those whose lands have been condemned.
2. ———: CONDEMNATION OF RIGHT OF WAY FOR: DESCRIPTIONS IN NOTICES. Where notices of condemnation described the land to be condemned as a certain number of feet on each side of the center line of the railroad, "as the same is located, staked and marked," *held*, that this description was sufficient, and if any other parts of the description in this case differed therefrom, they must yield thereto.

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3. ———: EMINENT DOMAIN: LATERAL LINES: STATUTE CONSTRUED.

When a company has the power to build an additional lateral road, that is, a lateral road whose construction and maintenance are possible only upon an independent right of way, the right of way statute does not prevent the condemnation of land for such additional road.

Appeal from Monroe Circuit Court.

FRIDAY, OCTOBER 20.

THESE cases are submitted together as arising for the most part out of substantially the same state of facts. The last two, however, differ from the first in one respect which will be noticed in the opinion. The plaintiffs respectively seek injunctions to restrain the defendants, the Chicago, Burlington & Quincy, R. R. Co., and the Chillicothe & Chariton R. R. Co., from condemning for right of way certain land of which they are respectively the owners. They aver in substance in their petition that in 1867, the Burlington & Missouri River R. R. Co. located its road through the lands in question and condemned for right of way so much of the lands as lies within fifty feet of the center of their track; that the company constructed its road, and afterwards the defendant, the C., B. & Q. R. Co., not organized under the laws of Iowa, succeeded to all its property; that in 1878 the C., B. & Q. R. R. Co. determined to build a lateral track as a part of their railroad, running on a different line, beginning near where their railroad crosses the east line of Monroe county, running thence west in the same general direction, first on the north side of their railroad, and then on the south side, to a point about three and one-half miles west of Albion, the lateral line being about fifteen miles in length; that the company acquired by purchase a conveyance of a right of way from nearly all the land owners, but the plaintiffs refused to convey to the company a right of way through their lands, being the lands in question; that thereupon certain persons, who were stockholders in the company, associated themselves together and became incorporated under the name

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of the Chillicothe & Chariton R. R. Co., for the ostensible purpose, as shown by their articles of incorporation, of "building a line of railroad from a point on the main line of the railroad owned and operated by the C., B. & Q. R. R. Co., near the east line of Monroe county, thence in a general westerly direction to a point on the main line of said railroad known as Central Crossing, thence in a general westerly direction to a point on the main line of said railroad about three and one-half miles west of Albia, upon such route as the company may hereafter determine;" that the real object of the company was to fraudulently assist the C., B. & Q. R. R. Co. in procuring a right of way for the lateral line which the latter company desired to build as above set forth; that the Chillicothe & Chariton R. R. Co., in pursuance of their fraudulent purpose, instituted proceedings for condemning right of way through their lands respectively; that unless prevented by an injunction the defendants will procure the condemnation of the right of way and complete and operate their lateral line of road. In an amended petition the plaintiffs averred that the Chillicothe & Chariton R. R. Co. had not marked out or determined upon any precise location of their line, nor taken steps to construct a road; that the company pretended to have chosen the line already marked out by the C., B. & Q. R. R. Co., but such choice was not for itself, but was a false and fraudulent pretense, it being understood between the two companies that the road was solely for the C., B. & Q. R. R. Co.; that since the commencement of the action, condemnation proceedings have been had, and the C., B. & Q. R. R. Co. has entered upon the land in question and partially constructed its road.

The defendants for answer admit that the C., B. & Q. R. R. Co., resolved to construct an additional line of road on the route described in the plaintiffs' petition, but deny all fraud, and aver that the proceedings for condemnation prosecuted by the Chillicothe & Chariton R. R. Co. have been regular and legal in every respect. The court upon hearing dismissed the plaintiffs' petition and they appeal.

James Coen and D. Anderson, for appellants.

Perry & Townsend, for appellees.

ADAMS, J.—The evidence shows that the Chillicothe & Chariton R. R. Co. has leased the road in question to the C., B. & Q. R. R. Co., and we think that the evidence shows that the former company was organized with the design of procuring a right of way and building a road to be used by the latter company.

1. RAILROADS: surrounding legal impediments through auxiliary company: no fraud.

It does not, however, follow that the plaintiffs have been defrauded. The land taken has been taken for public use, and just compensation, as we must assume, has been made to the plaintiffs. Their real ground for complaint, so far as their alleged equity is concerned, is that they have not been allowed to hold the key to the situation in such a way as to enable them to defeat the construction of the road, or obtain more than just compensation. The amount demanded by the plaintiffs was such as to show very clearly that it was graduated without any reference to the real damages sustained, but the supposed exigency of the company. Now, while it sometimes happens that a person can under the protection of the law practice extortion, it is proper for an intended victim to resort to every legal device to defeat the attempted extortion, and, if he succeeds, his action cannot properly be called fraudulent. The plaintiffs, indeed, do not themselves seem to place much reliance upon the alleged ground of fraud. This appears from the emphasis which they place upon the necessity of construing strictly the powers of a corporation. If we could see that the plaintiffs have been defrauded by the defendants, our way would be very clear. The fact of fraud would entitle the plaintiffs to relief, and it would be of very little consequence what the defendant's powers are. Now we apprehend that the real question in this case is not a question of fraud but of power. The plaintiffs we think have no right to relief unless they can maintain the correctness of the fol-

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lowing proposition: The C., B. & Q. R. R. Co. has no power to condemn the land in question; this being so, no other company can be organized with power to condemn it, whose sole object is to aid the C., B. & Q. R. R. Co.

A corporation has all the power expressed in its articles of incorporation or charter, and all other power reasonably incident to the exercise of the expressed powers, unless restricted by some statute or rule of law. The evidence does not show the articles of incorporation or charter of the C. B. & Q. R. R. Co., but if it is a foreign corporation as averred, it could not, prior to the act of March, 1878 (Sec. 1241 Miller's Code,) condemn land for right of way in this State, whatever its articles of incorporation or charter might provide. The lateral line in question appears to have been partially constructed in the summer and fall of 1878. The Chillicothe & Chariton R. R. Co. was organized in November, 1878. Whether the act in question had been overlooked or whether it was supposed that with that act the C., B. & Q. R. R. Co. had no power to condemn the land in question, or what view was taken, does not appear. The defendants insist that it is not material to consider what power the C., B. & Q. R. R. Co. had, so far as its articles of incorporation or charter was concerned; that if it should be conceded that it lacked the power in question, the deficiency might be supplied by an amendment of its articles of incorporation or charter, and, if so, that the organization of a new company under the laws of Iowa should be deemed equivalent to such amendment, at least so far as the plaintiffs are concerned. They say that the plaintiffs have not only been justly compensated, but that there has been a compliance with the forms of law, and so the plaintiffs have no ground of any kind upon which they can stand in a court of equity.

To this position the plaintiffs make several objections. They deny that there has been a compliance even with the forms of law. They say, among other things that the Chillicothe & Chariton R. R. Co. never surveyed any line of road,

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and at most merely adopted the line surveyed by the C., B. & Q. R. R. Co. But in our opinion the adoption of another company's survey was equivalent to making a survey for itself.

In two of the cases the plaintiffs filed supplemental petitions, avering that the land condemned did not wholly correspond with the land described in the notices of

^{2. — : con-} condemnation of right of way: descriptions in notices. we think that they were sufficient for the purpose for which they were designed.

The land is described as a certain number of feet on each side of the center line of the railroad "as the same is located, staked and marked." This, we think, must be deemed the controlling part of the description, and if any other parts differ therefrom, they must be held to yield thereto. The center line of the land condemned corresponds with the center line of the road as it was located, staked and marked." The irregularity, if any, is not such, we think, as to entitle the plaintiffs, or either of them, to any relief. We must hold, therefore, that there was a compliance with forms of law. There remains to be considered whether this was sufficient. The plaintiffs deny that it is. Their position is that it is against the policy of the law to allow a railroad company to condemn more than one hundred feet in width for a single line of road, though consisting of more than one track, and that if the condemnation is sustained in this case, we should sanction an act done indirectly which it is against the policy of the law to allow to be done directly.

The limitation of the right of condemnation was doubtless fixed at one hundred feet, because that was deemed by the legislature to be all that was necessary, whether the road

^{3. — : emi-} consisted of a single or double track. But ^{ment domain:} lateral lines^{*} we can conceive that a company might desire to ^{statute con-} build an additional road which should be lateral to the original road, and operated in connection with it as auxiliary. All the advantages of a double track might be se-

Lower v. The C., B. & Q. R. Co.

cured, and in addition thereto the advantages of a shorter line or improved grade. What the motives of the defendants were do not distinctly appear, but we apprehend that it was something of this kind. It is reasonable to expect of railroad companies improvements in their roads from time to time as fast as the increasing business of the country shall seem to demand them, and their own ability shall justify them in making them; and we do not believe that there is anything in the legislative policy of Iowa to prevent such improvements, even where they are to be made by building an additional lateral road. Now if a company can be allowed to build such a road, it must be allowed to condemn for it a right of way. And where the articles of incorporation or charter of a company are such as to confer such power so far as they are concerned, we think that there is nothing in the right of way statute to prevent its exercise. We are not now seeking to determine what is the power of the C., B. & Q. R. R. Co. We have not before us its articles of incorporation or charter. We are seeking merely to put a construction upon the right of way statute, and we hold that where a company has the power to build an additional lateral road auxiliary to the original road, that is, a lateral road whose construction and maintenance is possible only upon an independent right of way, the right of way statute does not prevent the condemnation of land for such additional road. If then the C., B. & Q. R. R. Co. lacks the power to build such road, it is simply because its articles of incorporation do not so provide, expressly, or by reasonable implication. But the Chillicothe & Chariton R. R. Co. can build the road, and that, too, even though it derives all its means from the C., B. & Q. R. R. Co., and builds it with the express design of leasing it to that company. Whether that company has the power to take a lease is another question, and one with which we have nothing to do. We think that the court did not err in dismissing the plaintiff's petition.

AFFIRMED.

Nesselrode v. Parish.

59 570
84 228
84 461

NESSELRODE V. PARISH ET AL.

1. **Practice: PROCEEDINGS TO ESTABLISH LOST CORNER: JURISDICTION:**
In a proceeding to establish a lost corner of land, a mere statement in the petition that other persons, therein named as defendants, besides the one who alone appeared and answered, are interested in the cause, is not sufficient evidence to establish that fact, and, in the absence of such sufficient evidence, the court had jurisdiction to appoint a commissioner to establish the corner as between the plaintiff and the one defendant who appeared, and his report will not be set aside because such alleged interested persons were not before the court, no notice having been served on them.
2. **Real Estate: TRUE CORNER:** The true corner of a government subdivision of land is where the United States surveyors in fact established it, whether such location is right or wrong, as shown by a subsequent survey.

Appeal from Guthrie District Court.

FRIDAY, OCTOBER 20.

THIS is a proceeding under the statute asking the appointment of a commissioner to establish a lost corner. The plaintiff appeals.

Chas. S. Fogg, for appellant.

C. Haden, for appellee.

SEEVERS, CII. J.—I. The petition states the plaintiff is the owner of the N. W. $\frac{1}{4}$ of Sec. 14, T. 79, R. 31, and that the northwest corner of said land is in dispute and lost or destroyed. Including the defendant Parish thirty-five persons were made defendants, and it was stated that they were the only land owners that would be “affected by the proceedings sought herein.” Certain named defendants were stated to be non-residents, and certain others minors.

The defendant Parish alone answered the petition, and denied the corner was destroyed or lost. The court appointed

Nesselrode v. Parish.

C. R. Allen, Esq. a commissioner to make a survey, establish and locate said corner, and make a report of his doings. The commissioner established the corner as claimed by the defendant Parish, and so reported. The report was confirmed. Objections were made thereto by the plaintiff, among which was that the "court erred in appointing said commissioner." Under this objection it is insisted the court had no jurisdiction or power to appoint a commissioner, because the record fails to show any notice was served on the defendants other than Parish, and there was no appearance for any of them except him. It is said *Nesselrode v. Parrish*, 52 Iowa, 269, was between the same parties, and in relation to the same subject matter, as in the present case. In that case the defendant, Parish, appeared and resisted the appointment of a commissioner because the proper foundation had not been laid for service on Wright by publication. It was held that the mere statement in an unverified petition of the non-residence of Wright was not sufficient to establish such fact. When the cause was remanded another commissioner was appointed.

It is stated in the petition that certain persons named as defendants are the "only" persons that would be affected by the proceedings. There is no evidence other than this statement in the petition tending to show the interest of said persons, or that they were necessary parties. We do not think the statement aforesaid is sufficient evidence of the alleged fact. The case comes within the reason of the rule established in the case just cited. The court, it must be conceded in the state of the record, had jurisdiction, and the power to appoint a commissioner as between the plaintiff and defendant Parrish, unless it appeared there were other persons who were necessary parties.

II. It is assigned as error that the court erred in not setting aside the report of the commissioner. Such an assignment is not sufficiently specific. But as no such <sup>2. REAL ES-
TATE: true</sup> corner. objection is made, we will consider briefly whether the evidence is sufficient to sustain the report of the commis-

Alexander v. Bishop.

sioner. The rule is regarded as well established that the true corner is where the United States surveyors in fact established it, whether such location is right or wrong as may be shown by a subsequent survey. The preponderance of the evidence, we think, was in favor of the disputed corner having been so established at the place claimed by the defendant. As the commissioner so found, we cannot disturb the finding. This disposition of the case makes it unnecessary to determine the motion filed by appellee.

AFFIRMED.

59	572
79	369
59	573
94	325
59	572
117	189
59	572
120	323
59	572
126	88

ALEXANDER, ASSIGNEE, v. BISHOP.

1. **Lessor and Lessee: MEASURE OF DAMAGES FOR WITHHOLDING LEASED PREMISES.** A. was occupying as a store room a building owned by B., under a lease which expired in October, 1882. July 22, 1880, the parties agreed in writing that B. should move the building into the adjoining street, there to be occupied by A. while B. should erect a better building on the site of the old one, which new building he agreed to have completed and turned over to A. by October 15, 1880. B. did not get the new building completed until June, 1881, and then refused to allow A. to take possession of it; but A. by legal measures, acquired possession of it June 4, 1881. A. was to hold the new building instead of the old one under the terms of the old lease, until the expiration thereof. *Held* that the measure of A's damages for the breach of the contract was the market rental value of the new building, less the rent agreed to be paid, from October 15, 1880 to June 4, 1881; and the action of the court below in allowing him the difference in the value of the use of the two places from October 15, 1880, to June 4, 1881, was *held* erroneous, as involving an inquiry into the extent of A's business, the amount of goods he would probably have sold in the new building, and the profits he would have made thereon—an inquiry too speculative and remote upon which to base a claim for damages. BECK, J., dissenting.

Appeal from Montgomery Circuit Court.

FRIDAY, OCTOBER 20.

ACTION at law to recover damages for the breach by defendant of the conditions of a written agreement between the par-

Alexander v. Bishop.

ties. The cause was tried without a jury and judgment was rendered for the plaintiff upon findings of fact and law by the court. Defendant appeals. The facts appear in the opinion.

Miller & Bartholomew, and McPherson & Murphy, for appellant.

N. S. Strawn and C. E. Richards, for appellee.

ROTHROCK, J.—We do not deem it necessary to set out at length the written contract. It appears from the record that the defendant owned a building which he had leased to the plaintiff and in which plaintiff was keeping a stock of merchandise as a retail dealer, and the lease was for a term which would have expired in October, 1882. The defendant desired to erect another and better house upon the ground where the leased building stood. Thereupon the parties, on the 22d day of July, 1880, entered into the written contract, the breach of which is complained of, by which it was agreed, in substance, that the defendant should remove the old building into an adjoining street to make room for the erection of the new building, and that plaintiff should continue his business in the old building until the new one should be completed which the defendant bound himself to do, and to have the same ready for occupancy by plaintiff, on or before the 15th day of October, 1880. There are other stipulations in the written contract not necessary to be mentioned here; they are sufficiently referred to in the findings of fact hereinafter set out.

The defendant removed the old store room into the street and commenced the erection of the new building, which he failed to complete by the time named in the contract, and the same was not completed and ready for use until June, 1881, when the defendant refused to allow the plaintiff to take possession thereof, and the plaintiff resorted to legal proceedings, and thereby acquired the possession on the 4th of June, 1881.

At the request of the defendant, the court made special findings of fact and conclusions of law, which were reduced to

Alexander v. Bishop.

writing and signed by the presiding judge. They are as follows:

"1. That at the making of the contract sued on, the parties, Brink and Bishop, stood as lessor and lessee under the lease in evidence.

"2. That Brink had been in business on the leased premises for about four years preceding, carrying on business as a merchant with a stock of dry goods and groceries, averaging from six to seven thousand dollars, and he had a right to continue under the said lease until October 29, 1882.

"3. That Bishop was bound by said lease to keep said premises in at least ordinary good repair.

"4. That by the contract sued on Brink granted Bishop the privilege of removing the old building with the goods therein into the street, and to erect a new building on the site, and agreed to occupy the old one in the street until October 15, next following, and thereafter to occupy the new one upon the terms of the lease.

"5. That in consideration thereof Bishop agreed to indemnify Brink against all loss, during or by reason of such removal, to keep the approaches of the old building in good order, to complete the new room and basement, as per specifications in the contract, and to give Brink the use thereof in lieu of the old room on or before October 15, 1880.

"7. That in pursuance of said agreement the old building was moved into the street; that no injury resulted to the goods during the act of removing the same, but in consequence thereof and of the unavoidable settling of the building upon its temporary foundation, the roof was opened so as to increase its leaky condition.

"8. That in consequence of the bad condition of the roof, Brink's goods were damaged by rain between the removal of the building and October 15, to the amount of \$59.55.

"9. That Bishop did keep the approaches to the old building in as good order as was contemplated by the parties, in view of the construction of the new building.

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“10. That Bishop failed to have the new building ready for use prior to the second day of June, 1881, and that he then and thereafter refused to allow Brink the possession thereof.

“11. That Bishop failed to construct a good substantial cellar under said room up to the bringing of this suit, in that the cellar was wet and no drainage was provided thereto, and in that no suitable entrance was made to said cellar.

“12. That by reason of Bishop’s refusal to let Brink have the new room when completed he was compelled to resort to legal proceedings to secure possession of the same, and did thereby obtain possession on June 4, 1881.

“That in obtaining possession he incurred a liability for an attorney’s fee worth \$50, expended in procuring the necessary writ four dollars, and in moving Bishop’s goods from the room five dollars.

“13. That the old building situated as it was, on the street, had no rental value as a place for the dry goods and grocery business during the winter months, and not over ten dollars per month at other seasons.

“14. That the rental value of the new store room and cellar completed as per contract was fifty dollars per month.

“15. That the rental value of cellar completed as per contract was ten dollars per month.

“16. That the contract sued on was made with respect to the business with which Brink had been and was then engaged and in contemplation of its continuance at that place until the expiration of the lease.

“17. That for the period from October 15, 1880, to June 4, 1881, the new building completed as per contract was worth one thousand dollars more than the old in a condition in which it was as a place of business to one carrying from six to seven thousand dollars in groceries and dry goods, who had been four years in that business on that corner, and who contemplated continuing therein until October 28, 1882.

“18. That Brink paid rent according to the terms of the lease up to the commencement of this suit.

Alexander v. Bishop.

"And I find as conclusions of law:

"1. That all consequences directly resulting from a breach of the contract, and which in view of the relations of the parties and the subject-matter of the contract were contemplated by them as forming a part of the inducements and considerations in the contract, are proper to be considered in estimating damages resulting from the breaches.

"2. That as the contract was not merely one of lease, but was made in view of and with reference to the business of plaintiff, the mere difference in rental value is not the measure of damage.

"3. That the measure of plaintiff's damage is the loss actually sustained to his goods by reason of the defective condition of the roof up to October 15, 1880; the difference in the value of the use of the two places from October 15, 1880, to June 4, 1881, to a person having the right that Brink had under the lease and contract, as a place in which to carry on the business with reference to which the contract was made; the amount actually and necessarily expended in procuring possession, and the value and use of the cellar from the time he obtained possession on until the commencement of this suit.

"Upon the foregoing findings judgment will be rendered in favor of the plaintiff.

For damages to goods to October 15, 1880..... \$59.55

For difference in the value of the use of the two

places from October 15, 1880 to June 4, 1881.... 1,000.00

For expenses in obtaining possession..... 59.00

For the use of the cellar from June 4, to December

11, 1881..... 75.00

Total..... \$1,193.75

J. GIVEN, Judge."

And on the same day (February 7, 1881) defendant filed his motion for judgment as follows:

Defendant moves for judgment only against him on the special findings of fact found by the court; viz, the aggregate or sum total of the following items; to-wit,

Alexander v. Bishop.

1. Rental value of new store room for seven months and nineteen days.....	\$383.33
2. Rental value of cellar from June 4, 1881, to com- mencement of this suit.....	75.00
3. Damage to goods.....	59.55
4. Expenses in obtaining possession.....	59.00
 Total.....	\$576.88

Less the rental value of old store room at \$10 a month, ex-
cepting winter months, being four and two-thirds months.

Leaving balance of \$530.22, for which said sum of \$530.22
defendant moves judgment be rendered against him, and for
no other or greater sum.

And for reasons.

1. "By the adoption of the correct rule for the measure of damages no greater sum should be allowed."
2. "That to allow a greater sum for plaintiff is to allow damages that are too remote, and speculative and contingent."

The court overruled the motion and entered judgment for the full amount as found in the special findings, to which the defendant excepted.

Some question is made by the plaintiff as to the right of the defendant to question the findings of fact because they are in response to his own request, and because of insufficient assignments of error. We do not regard these objections as well taken, and we need not give them further attention. A statement of them would demonstrate that they are without merit.

It will be observed that the defendant accepts the findings of fact as correct. By the 14th finding the rental value of the new store room and cellar completed as per contract was

fifty dollars a month. The defendant contends
1. LESSOR and
lessee; meas-
ure of dam-
ages; for with-
holding leased
premises.
this amount is the true measure of the plaintiff's
damages. But the court found that the new build-
ing was worth one thousand dollars more than the
old for the period from Oct. 15, 1880, to June 4, 1881, "in
the condition in which it was as a place of business to one

Alexander v. Bishop.

carrying from six to seven thousand dollars in groceries and dry goods, who had been four years in that business on that corner, and who contemplated continuing therein until October 28, 1882." The evidence upon which this finding was made is not in the record. But no such finding could have been made without evidence showing the extent of the plaintiff's business, the amount of goods he would probably have sold in the new building, and the profits he would have made thereon. No other evidence would have supported the finding. It will be readily seen that such evidence is purely speculative and too remote to base thereon a claim for damages.

Where a lessee is wrongfully kept out of leased premises, the measure of damages ordinarily is the market rental value less the rent agreed to be paid, or, as is stated in *Adair v. Bogle*, 20 Iowa, 238, "the difference between the rent reserved and the value of the premises for the term." In some adjudged cases the expression "value of the use" of the premises is employed instead of "rental value," but an attempt to make the one expression mean more than the other is a mere play upon words. They mean substantially the same thing. We see nothing in this case to take it out of the ordinary rule. Counsel for appellee cite the case of *Taft v. Tiede*, 55 Iowa, 370, as supporting the doctrine that plaintiff in this case is entitled to profits as damages. An examination of that case will show that the profits allowed did not depend upon any contingencies such as fluctuations of the market, failure of crops, stringency in the money market, or any other uncertain event. The price of the commodity to be manufactured was in that case fixed by the contract. That profits are not ordinarily recoverable in an action for a breach of contract, see *Howe Machine Co. v. Bryson*, 44 Iowa, 159.

It was no doubt competent for the parties to have contracted that for failure to finish the new building within the time stipulated the defendant should be liable for more than the rental value. But where a contract contains no such stipulation the profits of a business are so uncertain and specu-

Alexander v. Bishop.

lative and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of the contract. There is, it is true, a class of cases where the loss of profits are allowable as a measure of damages. In *Allis v. McLean*, Sup. Ct. Mich., N. W. Rep. Vol. 12, 640, it is said: "It often happens also that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits under the other is a necessary and immediate consequence. There is no difficulty in saying in some such cases that profits lost are the proper measure of damages." Citing *Hand v. Campbell*, 26 Mich., 429, *Booth v. Rolling Mill Co.*, 60 N. Y., 487; *Salvo v. Duncan*, 49 Wis., 151, and other cases.

But the profits of a mercantile business are notoriously uncertain, speculative and contingent. They depend upon capital, skill, the fluctuation of the markets, the character of the competition of others in the same business, and many other contingencies, and, if allowed as a proper element of damages, no man could know in advance the extent to which he might be liable in a contract like the one in the case at bar. The dividing line between direct and remote damages can never be clearly defined, because each case must depend upon its own facts, but we think no well considered case can be found where a court has advanced so far into the field of speculation as is required by the rule adopted by the Circuit Court in this case.

The motion for judgment against defendant in the sum of \$530.22 should have been sustained.

REVERSED.

BCK, J., dissenting.—It will be observed, by attention to the statement of the facts made in the foregoing opinion, that the defendant was bound by the contract between the parties to furnish plaintiff the new house on the 15th of October, 1880. The plaintiff was to pay therefor a stipulated

Alexander v. Bishop.

rent. By the defendant's default the plaintiff was deprived of the use of the new house. The law requires that he shall be compensated for the direct and certain loss he sustained by the default of defendant. This loss, it is plain, is the value of the use of the new house to plaintiff, less the value of the use of the old one. The rent agreed to be paid for the respective buildings, or their rental value, does not determine the value of the use of each to plaintiff. The use of a house rented at \$50 per month may be of the value of \$150 per month to the tenant. If the tenant is deprived of its occupancy in any manner, he would not be fully compensated for his loss unless he be paid the full value of its use to him. To allow him the rental value of the house if it be less than the value of its use, would not render adequate compensation. So, if a tenant is bound to pay \$50 per month, the rental value of the premises, and having paid no rent, is deprived of the house, he could not recover, if it be shown that the value of the use of the premises to him is less than the rental value he agreed to pay. The law in these cases allows to the tenant the value to him of the use of the premises of which he is deprived.

In the case before us, the value of the use of the new house to plaintiff in the prosecution of his business, the extent and character of that business, and the advantages which he would derive from its occupancy in connection with his established trade, were all in the contemplation of the parties to the contract, and were inducements thereto. The defendant undertook to furnish the house for the purposes of plaintiff's peculiar business and trade, and he was thus apprised of the losses which plaintiff would suffer by his default; he became bound to reimburse plaintiff therefor.

This court has held in *Adair v. Bogle*, 20 Iowa, 238, that a lessee may recover the value of the use of leased premises, less rent due, in an action against the lessor, who withholds the leased premises from him. The facts of the case before us bring it within this rule. The defendant, by his failure to

Hudson v. C. & N. W. R. R. Co.

perform his contract, kept plaintiff out of possession of the leased premises. He is liable, in this action, for the value of the use of the new house to plaintiff during the time he withheld its possession in violation of the terms of the contract.

Our conclusions above expressed are supported by the following authorities: *Mihills Manufacturing Co. v. Day Bros.*, 50, Iowa, 250; *Winne v. Kelley*, 34 Iowa, 339; *Trull v. Granger*, 8 N. Y., 115; *Hixter v. Knox*, 63 N. Y., 561; *Myers v. Burns*, 35 N. Y., 269; *Griffin v. Colon*, 16 N. Y., 489; *Masterton & Smith v. Mayor of Brooklyn*, 7 Hill 61; *Leyfert v. Bean*, 83 Pa. St., 450; *Hinckley v. Beckwith*, 13 Wis., 31; *Hadley et al. v. Baxandale et al.*, 9 Exch., 341. See also cases cited in notes to Sedgwick on the Measure of Damages, 140.

It is my opinion that the judgment of the Circuit Court is correct and ought to be affirmed.

HUDSON v. C., & N. W. R. R. Co.

1. **Appeal to Supreme Court: LESS THAN \$100: QUESTION OF EVIDENCE TO SUPPORT VERDICT.** Although the question as to the sufficiency of the evidence to support a verdict may in a certain sense be said to become a question of law, yet it is not such a question as the legislature intended should be certified to this court in cases involving less than \$100.
2. **Railroads: NEGLIGENT CONSTRUCTION: EVIDENCE OF PRIOR ACCIDENT.** In an action for damages for injury to a horse by reason of the negligent and defective construction of a railroad crossing, evidence of a former and similar accident, which happened to another at the same place, was not competent, and should have been excluded.
3. _____: _____: EVIDENCE OF REPAIRING DEFECT AFTER ACCIDENT. Evidence to the effect that, a day or two after the accident, the defendant's employes changed the crossing in such a manner as to avoid the defect complained of, could have no other purpose than to establish an admission on the part of the defendant of its own negligence at the time of the accident; and the evidence could not be admitted for that purpose, without a violation of the well established rule, that an admission made by an employe or agent, after the transaction, cannot be introduced as evidence against his principal.

59	581
79	268
79	486
59	581
89	572
59	581
91	605
59	581
97	456
99	394
59	581
103	669
59	581
109	221
d109	222
59	581
114	280
d114	554
59	581
123	100
59	581
128	196
59	581
129	613
f130	574
59	581
d181	33
59	581
140	192

Hudson v. C. & N. W. R. R. Co.

Appeal from Marshall Circuit Court.

FRIDAY, OCTOBER 20.

The plaintiff claims damages in the sum of one hundred dollars for an injury to a horse, alleged to have been caused by a defective crossing over defendant's road; the defect consisting in placing the plank on the inside of one of the iron rails of the road so far from the rail that, in driving the horse over the crossing, he stepped into the aperture thus made, and was injured and crippled.

There was a trial by jury and a verdict and judgment for the plaintiff. Defendant appeals.

Hubbard, Clark & Dawley, for appellant.

Sutton & Childs, for appellee.

ROTHROCK, J.—I. The amount in controversy as shown by the pleadings does not exceed one hundred dollars, and

1. APPEAL TO SUPREME COURT: less than \$100: question of evidence to support verdict. certain questions are certified to this court for an opinion. The first question is as follows: "Did the court err in refusing to set aside the verdict as being contrary to the evidence?" Objection is made to this question upon the ground that it involves no such matter of law as to authorize its certification. On the other hand, it is claimed that, when a verdict is so contrary to the evidence as in this case, it is the duty of the trial court as a matter of law to set it aside, and the matter then becomes a question of law proper to be certified to this court.

The object and purpose of the statute (Code, § 3173) was to prohibit appeals in unimportant cases. Such of these cases as involve questions of law upon which it is desirable to have the opinion of the Supreme Court are saved from the operation of the statute. The object is that where new and important questions arise in cases of this character appeals shall be allowed for the purpose of settling the questions involved, and making the decisions thereon authority in cases

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afterwards arising in the courts. Now, although the question as to the sufficiency of the evidence to support a verdict may in a certain sense be said to become a question of law, yet it could not have been intended that this court should be required to take up the case on its facts, examine and weigh the evidence, and determine whether the jury were justified from the evidence in finding the verdict. A determination of such a question would be desirable to no one but the parties to the suit, and would be no authority in the future trial of cases.

II. Plaintiff introduced a witness who testified that, some six months before the accident complained of, a horse driven

2. RAIL-
ROADS: neg-
lent con-
struction:
evidence of
prior acci-
dent. by him over the crossing in question got his foot between the plank and the rail at the same place where plaintiff's horse was injured. The defendant objected to this testimony as incompetent.

The objection was overruled and an exception taken. Upon this point in the case the Circuit Court certified the following question: "Ought the court to have admitted evidence of former accidents at the same place to parties other than the plaintiff?"

In *Collins v. Inhabitants of Dorchester*, 6 Cush., 396, the plaintiff was injured by driving against a post in a highway. He sought to prove that another person had met with precisely the same kind of accident before, at the same place, and from the same cause.

In determining the question the court said: "The testimony of Sprague that he, before the injury complained of by the plaintiff, received a similar injury at or near the same place, without any negligence on his part, was not competent for the purpose of proving that the road was defective at the time and in the place of the plaintiff's injury. It was testimony concerning collateral facts which furnish no legal presumption as to the principal facts in dispute, and which defendants were not bound to be prepared to meet. 2 Stark. on Ev., 381; 1 Green Ev., § 52."

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Parker v. Portland Publishing Company, 69 Maine, 173, was an action to recover damages for negligence in not properly lighting a passage way. Evidence was received tending to show at different times the condition of the hall way and the entrance to the rooms of the building as to light—whether more or less or none—and of what had happened to other men at other times, and of their fortunate escape from peril. The court, APPLETON, J., said: "These facts were all collateral to the main issue, and should have been excluded." Citing 1 Greenleaf on Evidence, Sec. 52. It was further said: "If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them." It was held that allowing such evidence to be introduced was against the entire weight of judicial authority; citing *Hubbard v. R. R.*, 39 Maine, 506; *Aldrich v. Pelham*, 1 Gray, 510; *Kidder v. Dunstable*, 11 Id., 342; and other cases.

In *Blair v. Pelham*, 118 Mass., 420, an action for a personal injury caused by a defect in a highway, it was held that what happened at the same place a year before was rightly rejected.

A different rule was announced in the case of *Kelley v. The Southern Minn. R. R. Co.*, Sup. Court of Minn., N. W. Rep., Vol. 9, 588. But it appears in that case that the testimony objected to showed that the accident to which it related "was produced by a different cause, and at a point in the crossing about the condition of which there was no complaint," and the court held that the defendant, if it deemed the evidence prejudicial, should have moved to have it stricken out. The rule as stated in the opinion in that case is not discussed, and no authority is given in its support.

We think, both upon principle and authority, the evidence in question was improperly admitted, and that the question certified must be answered in the negative.

III. Testimony was received over defendant's objection

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to the effect that, a day or two after the accident of which
^{3. — . —} plaintiff complains, the employes of the defendant
evidence of repairing de- were at work at the crossing, "lifting the planks
fect after ac- and making them different," and a witness stated
ident. that the plank where the accident happened "looked to be
closer" to the rail after than before the repairs were made.
The court certified this question upon that subject: "Did the
court err in admitting testimony to show that the crossing
had been changed and repaired after the accident?"

We are clearly of the opinion that this question should be answered in the affirmative. The evidence could have been introduced and used before the jury for no other purpose than as an admission upon the part of the defendant that it had been negligent in keeping the crossing in proper repair prior to and up to the time of the accident. The admission of this evidence is in direct conflict with the case of *Cramer v. The City of Burlington*, 45 Iowa, 627. It is in principle contrary to the well established doctrine, that an admission made by an employe or agent, after the transaction, cannot be introduced as evidence against his principal. See *Sweetland v. Ill. & Miss. Telegraph Co.*, 27 Iowa, 433. To render such admission competent, it must be shown that it was both within the scope of the agency or employment, and made during the continuance of it in respect to the transaction then depending, or, in case of a corporation or company, the admission must be made by one having authority to bind the company.

Appellee cites several adjudged cases which hold that evidence of such repairs may be shown. Whatever the rule may be in other jurisdictions, we regard it as settled in this State, and see no reason to make it otherwise, believing that it is correct in principle. There are other questions certified which we need not set out or discuss. They are in substance embraced in those above determined. The judgment of the Circuit Court will be reversed, and the cause remanded for a new trial.

REVERSED.

McAnnulty v. Seick.

McANNULTY V. SEICK.

- 59 586**
86 423
- 59 586**
97 750
- 59 586**
105 566
- 59 586**
113 723
- 59 586**
116 502
- 59 586**
122 28
- 59 586**
134 547
1. **Practice: BILL OF EXCEPTIONS: PRESERVING EVIDENCE.** Where the original notes of the reporter were duly filed, and then, instead of being referred to in the bill of exceptions, were incorporated therein, and a long hand copy, duly certified, was inserted in the transcript, *held*, if not a literal, at least a substantial compliance with section 3777 of the Code, as amended by Chapter 195, laws of 1880.
 2. **Evidence: PAROL TO SHOW THAT BILL OF SALE WAS INTENDED FOR MORTGAGE.** While the authorities are conflicting, the weight of reason, in the opinion of this court, is in favor of the rule, that parol evidence is admissible in an action at law as well as in equity, to show that a bill of sale, absolute on its face, was intended as a mortgage; and in an action by the holder of the bill of sale to recover the property, where the bill is not set up in the petition as the ground of plaintiff's claim, the defendant may introduce such parol evidence without pleading the facts in his answer.
 3. **— : — : DEGREE OF EVIDENCE.** While it is true that the rule by which a chancellor governs his own action, in cases in which it is sought by parol evidence to convert a deed, absolute on its face, into a mortgage, is that "the proof should be clear, satisfactory and conclusive," yet it is the established rule of this State that questions of fact, submitted to a jury in civil cases, are to be determined by a simple preponderance of the evidence.

Appeal from Marshall Circuit Court.

FRIDAY, OCTOBER 20.

THIS is an action of replevin for the following goods and chattels: One board partition, one shot-gun, one rifle, one desk, one invoice book, one account book, eight joints of stove pipe, eight white wash brushes, one papering board, two trestles, one extension ladder, three brackets, three scaffolding boards, one spring wagon and pole, two horses and one sign. The plaintiff alleges that he is the unconditional owner of all of this property and entitled to its immediate possession. The defendant for answer claims that he is entitled to the possession of said property as the owner thereof. The cause was tried to a jury, and a verdict was returned for the defendant, assessing the value of the property at \$400.

McAnnulty v. Seick.

A motion for a new trial was filed, and overruled, and judgment was entered for the defendant. The plaintiff appeals.

Brown & Carney for the appellant.

Hamlin & Miller and *Sutton & Childs*, for the appellee.

DAY, J.—I. The appellee filed and submitted with the case a motion to strike from the transcript and from the abstract what purports to be testimony in the case, upon the ground that it was not preserved by any proper bill of exceptions. The trial commenced on the 22d day of October, 1881, and the verdict was returned on the 26th day of October. Judgment was rendered on the 3d day of November. On the 28th day of November, a bill of exceptions was filed as follows: "Be it remembered that on the 22nd day of October, 1881, it being the 6th day of the October term, 1881, of the court, this cause came on for hearing and trial before the court and a jury, and at request of the parties, A. N. Boyce, official short hand reporter of this court, was directed to take down in writing all the evidence introduced by either and both parties in this cause, and all objections made to any evidence offered, and the rulings of the court and exceptions taken thereto, and to make a record of all evidence and testimony offered and received, or excluded, and exceptions thereto, by either party. All of which was done under direction of the court and made part of the record, and the following is all the evidence offered, received and introduced on the trial of said cause by either party.

1. PRACTICE: bill of exceptions: preserving evidence.

Here follows the original stenographic notes of the short hand reporter, A. N. Boyce, of the evidence taken in the trial of the cause, written in short hand, to which is attached the following certificate "the above and foregoing is all the evidence offered and introduced by either party, together with the rulings of the court on the evidence, and the exceptions thereto. By agreement sixty days time was given plaintiff

McAnnulty v. Seick.

to prepare a bill of exceptions, and the plaintiff now here presents this his bill of exceptions, and asks that the same be signed by the court and made a part of the record, which is accordingly done.

D. D. MIRACLE, *Judge.*"

The clerk certifies that the short hand notes were first filed in his office by the official reporter, on the 24th day of October, 1881, and that afterwards, on the 28th day of November, 1881, the same short hand notes, with the writing above set out attached thereto, were filed as a bill of exceptions, and that there have never been any extended notes of the reporter on file except the extended notes certified to the Supreme Court in the transcript. In the transcript the evidence appears extended in full, with a certificate of the official reporter that it is a full, complete and accurate transcript of the short hand notes taken in the case. Section 3777 of the Code, as amended by chapter 195, Acts of the 18th General Assembly provides: "The original notes of any testimony taken in any case shall be filed in the office of the clerk of the court and become a part of the record in said case; * * and said original notes, or the transcript thereof, or any part thereof, may be referred to in any bill of exceptions, and when duly transcribed and certified shall be inserted therein on appeal." In this case the original notes were duly filed, and then instead of being referred to in the bill of exceptions, were incorporated therein and a long hand copy thereof duly certified was inserted in the transcript. This if not a literal, is at the least a substantial, compliance with the provisions of section 3777 of the Code. The motion to strike out the evidence is overruled.

II. The appellee filed an amended abstract, the correctness of which the appellant denies. We have thus been

^{2. EVIDENCE:} driven to an examination of the transcript. The parol to show that bill of sale was intended for mortgage: plaintiff introduced in evidence a bill of sale from the defendant to the plaintiff, dated August 28, 1878, for the consideration of \$100, of cer-

McAnnulty v. Seick.

tain personal property, including the following property in controversy in this action; namely, one black mare one black horse, one set double harness, one platform spring wagon. The defendant was offered as a witness on his own behalf, and was asked the following question. "You may state whether or not there was any agreement between you and Mr. McAnnulty, at the time of the execution of the bill of sale introduced in evidence, as to a redemption of the property described in it? The plaintiff objected to this question as tending to contradict the written contract, immaterial, not pleaded, and irrelevant under the issues. The court overruled the objection, to which the plaintiff excepted. "The witness answered as follows: The agreement was that, when I paid him back the money he let me have, he would destroy or give me the bill of sale back, and I was to hold the property." The admission of this evidence is assigned as error. 1. It is claimed that evidence of a parol contemporaneous agreement that the bill of sale was to be considered as a mortgage, could not be introduced without pleading such facts. The plaintiff did not in his petition claim that his title to the property was evidenced by a bill of sale. He simply alleged generally that he was the owner of the property. The first reference in the case to the bill of sale was when it was offered in evidence. The defendant had no opportunity to plead the facts converting the bill of sale into a mortgage. He could not be required to anticipate that the plaintiff would attempt to make out his title to the property by the production of a bill of sale. We think, therefore, that if it is competent at all, in an action of this kind, to introduce evidence to show that a bill of sale was intended to operate as a mortgage, such evidence may be introduced without pleading the facts.

2. It is claimed that it is not competent, in a court of law, to change a bill of sale of personal property into a mortgage. There seems to be a conflict in the authorities upon this subject. The case of *Hogel v. Lindel*, 10 Missouri, 483, holds

McAnnulty v. Seick.

that it is not competent at law to show by parol that a deed absolute on its face is in fact a mortgage.

The contrary doctrine is announced in *Fuller v. Pauch*, 3 Mich., 211, and it is supported by reasoning which is satisfactory and convincing. To the same effect see *Cunningham v. Hawkins*, 27 Cal., 603; *Jackson v. Lodge*, 36 Id., 28. The weight of reason, in our opinion, is in favor of the rule that parol evidence is admissible in an action at law, as well as in equity, to show that a bill of sale absolute upon its face was intended as a mortgage.

III. It is insisted that the court erred in instructing the jury that "the presumption of ownership arising from the bill of sale must be overcome by the defendant ^{3. degree of evi:} by a preponderance of evidence." It is insisted ^{dence:} that a bare preponderance of evidence is not sufficient, but that the proof should be strong, clear and satisfactory. The rule by which a chancellor governs his own action in cases in which it is sought by parol evidence to convert a deed absolute on its face into a mortgage, is that the "proof should be clear, satisfactory and conclusive." *Corbit v. Smith*, 7 Iowa, 60; *Hyatt v. Cochran*, 37 Iowa, 309. To the same effect see *Cooper v. Skeel*, 14 Iowa, 578; *Maple v. Nelson*, 31 Iowa, 322; *Epps v. Dickerson*, 35 Iowa, 301. It is, however, the established law of this State, that questions of fact submitted to a jury in civil cases are to be determined by a preponderance of evidence. *Welch v. Jugenheimer*, 56 Iowa 11. We discover no error in the record.

AFFIRMED.

Phenix Ins. Co v. Findley.

PHENIX INS. CO. V. FINDLEY ET AL.

1. **Pleading and Practice:** REPETITION OF BAD PLEA. Where the first answer was held bad on demurrer, and the second count of the substituted answer differed from the first answer only in the addition of a few allegations which were immaterial, the said second count was properly stricken out on motion.
2. **Surety: BOND OF INSURANCE AGENT: NEGLIGENCE OF COMPANY.** The sureties on the bond of an insurance agent, executed to the company for the fidelity of the agent, are not discharged from liability from the mere fact that the agent was continued in the employment of the company after he had failed to make payment promptly, of which fact the sureties were not advised.
3. **Practice in Supreme Court: ERROR WITH ONLY NOMINAL PREJUDICE: NO GROUND FOR REVERSAL.** In this case, the third count of appellant's answer was held bad on demurrer in the court below. If that count was good for anything as a defense (which this court considers very doubtful) it was good only for a nominal sum; and this court will not reverse a case to allow the appellant to recover nominal damages to which he shows that he is entitled.
4. **Evidence: RECITALS IN BOND: SURETIES ESTOPPED.** Where the bond on which the suit was brought recited the appointment of the principal obligor as agent, and specified the duties he was required to perform, for default of which the sureties were liable; *held* that they were estopped, in a suit on the bond, to deny the agency, and it was, therefore, not necessary to prove it by his commission or other writing.
5. **Practice in Supreme Court: EVIDENCE NOT CERTIFIED.** Where the abstract does not show that the evidence is all certified, this court cannot hold that the verdict was not supported by the evidence; and a statement in the abstract that "the record here abstracted contained all the evidence," is very far from saying that the abstract contains all the evidence.

Appeal from Fremont District Court.

FRIDAY, OCTOBER 20.

ACTION against the sureties upon a bond given by an agent of plaintiff to secure the faithful performance of his duties. There was a judgment upon a verdict for plaintiff; defendants appeal.

59	591
83	288
59	591
88	729
59	591
91	680
59	591
104	259
59	591
129	482

Phenix Ins. Co. v. Findley.

Stowe & Hammond, for appellant.

No appearance for appellee.

BECK, J.—I. The condition of the bond in suit is in the following language:

"The condition of this obligation is such that whereas the above named R. S. Carr has been appointed agent of the Phenix Insurance Company in the city of Hamburg, county of Fremont and State of Iowa, who will receive, as such agent, sums of money as premiums, payment of losses, salvages, collections or otherwise, for goods, chattels or other property for the said Phenix Insurance Company; and is to keep true and correct account of the same; pay over such money correctly; and make regular reports of the business transacted by him, to the said Phenix Insurance Company; and in every way faithfully perform the duties as agent in compliance with the instructions of the company, through its proper officers; and at the end of the agency by any cause whatever, shall deliver up to the authorized agent of said company, all its money, books and property due from or in his possession. Now then if the aforesaid agent shall faithfully perform all and singular the duties of the agency of the Phenix Insurance Company, then this obligation shall be null and void."

The petition alleges that Carr collected between July 18, and October 16, various premiums upon policies amounting to \$273; that his commissions thereon are \$66 and that there is due from him to plaintiff \$207.60, which he failed and refused to pay the plaintiffs. The defendants filed the following answer to the petition:

"That by the terms of Carr's agency and by the usage and custom of insurance companies, it was the duty and business of the company to require and make monthly settlements with their agents, and to require of their said agent monthly payments of all moneys in his hands. But that the plaintiff company, from month to month after the making of said bond,

Phenix Ins. Co. v. Findley.

and until Nov. 1, 1870, without any knowledge on the part of these defendants, with intent to favor and give credit to the said Carr, permitted him to go from month to month without making settlement and payment of his account. And from month to month, with a full knowledge of the said Carr's embezzlements and defaults, plaintiff continued to transact business with him as agent, and entrust him with the conduct and transaction of their business; and with such knowledge, from month to month, they negligently continued to extend to him credit and confidence, and to entrust him with the collection and disbursement of their money.

"That these defendants had no knowledge or means of knowledge of the said agent's repeated defalcations and embezzlements, and had no knowledge or notice of the extension of time, credits and favors extended by plaintiff to said agent, at any time before he absconded in November, 1879. Had such notice been given, the defendants could and would have protected themselves against loss."

A demurrer to this answer was sustained, and thereupon defendants filed a substituted answer in the following language:

"1st Count. Defendants deny all liability, generally and specifically, as set out in petition.

"2d Count. (This count is substantially the same as the original answer, with the following additions): "That it was the custom and usage of this company to make monthly settlements with agents, etc. That the plaintiff's officers knew these defendants had no knowledge or means of knowledge as to the defalcations of Carr. And with full knowledge of the defalcations and monthly embezzlements, the plaintiff continued to extend credits—extend time and entrust said agent with their business, for the purpose of procuring in return the favor and business of the said Carr, and for their own selfish motives, knowing well the peril it might bring to these defendants.

"3d Count. At the time of Carr's absconding, defendants
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Phenix Ins. Co. v. Findley.

were in possession of sufficient personal property of his with which to have secured themselves, had they known of any liability. While so in possession, defendants wrote to the company, making inquiry as to loss, if any. Plaintiff negligently failed to inform the defendants of any claim of loss in reply to said letter, for two or three weeks, and until said property was taken from them. Plaintiff acknowledged the receipt of defendants' letter. Had the officers and agents of the plaintiff company made prompt and diligent answer, as they ought, defendants could and would have protected themselves againsts loss."

A motion to strike the second count of the answer, on the ground that it contained the same matter as pleaded in the first answer, was sustained.

A demurrer to the third count of the substituted answer was sustained.

These several rulings are the grounds of as many alleged errors assigned by defendants.

II. We may regard the second count of the substituted answer as a repetition of the first answer. Whatever it contains that is not substantially pleaded in the first answer is immaterial. The motion to strike bad plea. was therefore rightly sustained.

III. The answer in substance alleges that plaintiff continued the agent in its employment, after his default and failure to pay, as charged in the petition, of which defendants had no knowledge or means of knowledge. The use of the words "embezzlements," "defalcations" etc., in the answer, do not present transactions other than those declared upon in the petition. The pleader applies those epithets to the failure and refusal of the principal to pay the sums of money as charged in the petition. The answer does not contain allegations of facts showing any transactions different from those set out in the petition. Hard names in pleadings will not take the place of allegations of fact. The answer therefore must be regarded as setting up

Phoenix Ins. Co. v. Findley.

as a defense the continuation of the agent in business by plaintiff during the time his arrearages were accruing, and the failure to notify defendants thereof. But this court has held that "a surety is not discharged from liabilities from the mere fact that the principal is continued in the master's employment after he has failed to make payment promptly, of which fact the surety has not been advised." *Home Ins. Co. v. Holway*, 55 Iowa, 571. The demurrer to the answer was properly sustained.

IV. The third count of the answer is, in effect, that defendants gave up property of Carr held by them, by reason of the negligence of plaintiff in failing to respond promptly to their enquiry in regard to the default of Carr. Conceding that upon the facts pleaded the defendant sustained injury, which may be set up as a defense to this action (a very doubtful question), they cannot be relieved of liability farther than to the extent of such injury. The value of the property which defendants could have used in their own protection would measure the extent of their injury, and this value, and no more, could be set off against plaintiff's claim. But the answer does not show the value of the property; defendant's injury must therefore be regarded as nominal only. The answer, therefore, presented a defense to the extent of a nominal sum. The ruling of the court in sustaining the demurrer defeated recovery therefor. But this court will not reverse a cause to allow appellant to recover nominal damages to which he shows that he is entitled. *Rowley v. Jewett*, 56 Iowa, 492.

V. The defendants base an objection upon the ruling of the court below in refusing to require proof of Carr's agency by his commission or written appointment. The bond upon which suit is brought recites the appointment of Carr, and specifies the duties he is required to perform, for default in which defendants are liable. They are estopped by the bond to deny Carr's agency, and it

3. PRACTICE
in supreme
court: error
with only
nominal pre-
judice: no
ground for
reversal.

4. EVIDENCE:
recitals in
bond: sureties
estopped by.

Butterfield & Co. v. Stephens.

was not, therefore, necessary to prove it by his commission, or by other written instrument.

VI. Defendants insist that the evidence does not support the verdict, and that some of the items set out in plaintiff's petition were not proved. But the abstract does ^{§. PRACTICE in supreme court: evidence not certified.} not purport to contain all the evidence. It is stated in the abstract that "it was certified that the record here abstracted contained all of the evidence." This is far from a statement that the abstract contains all the evidence.

The foregoing discussion disposes of all questions raised in the case.

AFFIRMED.

59 596
118 422

BUTTERFIELD & CO. V. STEPHENS ET AL.

1. **Sale: of PERSONAL PROPERTY: LIABILITY OF CONSIGNEE.** Where advances are made by the consignee or commission merchant on goods consigned, the consignor cannot direct a sale at his pleasure, but the consignee has the right to sell at such time as he sees proper, to the extent, and in payment, of his advances. If, however, the consignor orders a sale, and the consignee neglects to sell, not because he has made advances, but because he is negligent, then he cannot protect himself on the ground that he has made advances; but this in a question of fact for the jury.
2. **Practice: EXCEPTIONS TO INSTRUCTIONS: MOTION FOR NEW TRIAL.** Where instructions are excepted to at the time they are given, it is not necessary to make further exceptions to them in a motion for a new trial. In such case, no motion for a new trial is required. Code, § 3169.

Appeal from Story Circuit Court.

FRIDAY, OCTOBER 20.

THE plaintiffs are commission merchants, residing in Boston, Mass., and the defendants are dealers in butter, at Nevada, Iowa. In 1877 and 1878 the latter shipped to the former several consignments of butter to be sold on the market. The

Butterfield & Co. v. Stephens.

plaintiffs claim the defendants are indebted to them for advances, interest, and storage of the butter, to recover which this action was brought. The defendants pleaded a counter-claim, and sought to recover thereon, on the ground the plaintiffs had negligently, and in disregard of orders given them, failed to sell the butter when it should have been sold, but, on the contrary, held the same until it became comparatively worthless. Trial by jury, verdict for the defendants, and judgment. The plaintiffs appeal.

Jas. L. Frazier and Brown and Dudley, for appellants.

F. D. Tompson, for appellees.

SEEVERS, CH. J.—There was evidence tending to show the plaintiffs made advances on each consignment of the butter shipped to them by the defendants. They, therefore, had a special property in the butter to the extent of the money advanced.

The court instructed the jury as follows:

“8. If the defendants at the time of the shipments or consignments of the butter directed its immediate sale, or if the usages of trade required the plaintiffs to make immediate sales upon arrival, and they (the plaintiffs) in disregard of the directions or the usages of trade, failed or neglected to make sales, if sales could be made in the market, and on their own motion stored the butter, the plaintiffs cannot recover their claim for storage, but if there was no agreement or usage of trade requiring them to make immediate sale, and the plaintiffs left to their discretion about sales, and in the matter of storage they acted as reasonably discreet business men, and as seemed to them from that standpoint to be for the best interests of the defendants, they are entitled to recover the amount actually expended for storage, and for the purpose of this trial the amount is agreed to be \$60.69.

“9. If the plaintiffs, as commission merchants, undertook to receive from the defendants consignments of butter, and

Butterfield & Co. v. Stephens.

sell the same for the defendants in the market, and make remittances of the proceeds, they would be held to the exercise of diligence and faithfulness in the business under orders or directions, if orders or directions were given, and if no orders or directions were given, then under the ordinary and customary usages of the business, and would be held to bring to the business in hand reasonable business capacity, and if in this case they have failed to do so, and have neglected and failed to make sales where the exercise of a reasonable business discretion would require them to make sales, and held the same for an unreasonable length of time, so that the quality and grade of the butter was greatly reduced, and it was depreciated in value, they are liable to the defendants in damages, and the measure of their recovery will be the difference between what was actually realized for the butter, and what might have been realized by a timely sale, such as would have been made by a reasonably discreet business man, under like or simular circumstances."

It will be observed the foregoing instructions make no distinction between a case where advances are or are not made. That there should be, we think, must be true. But whether so or not, the rule is, where advances are made by the consignee or commission merchant, that the consignor cannot direct a sale at his pleasure. In such a case the consignee, in the absence of an agreement, has the right to sell at such time as he sees proper, to the extent of and in payment of his advances. *Brown & Co. v. McGraw*, 14 Pet., 479; *Weed v. Adams*, 37 Conn., 378; *Howard v. Davis*, 40 Mich., 546; *Field v. Farrington*, 10 Wall., 141.

We do not understand counsel for the appellee to controvert the rule above stated, but they say there is no evidence tending to show the plaintiffs failed to sell because of the advances made, but that they held the butter because there was no sale therefor. It is evident, if the butter could not be sold at any price, the plaintiffs should not be liable because they failed to do that which was impossible. If the failure

Dreher v. I. S. W. R. Co.

to sell was not because of advances, and the claim now made is an afterthought, such questions should have been submitted to the jury. In other words, if failure to sell because of advances is a mere pretence, and the same was not made, insisted upon, or relied upon at the time the directions to sell was received (if such there were), or when the plaintiffs would have otherwise been required to sell by the usages of trade, then, we think, the plaintiffs are not entitled to protection by reason of such advances. *Weed v. Adams*, before cited. Such questions, however, should have been submitted to the jury.

We think the instructions are erroneous. It is said, however, no objections were made to the foregoing instructions in the motion for a new trial. They, however, were excepted to at the time they were given. In such case it is immaterial whether there was a motion for a new trial filed or not, and in fact none is required. Code, § 3169.

This disposition of the case made it unnecessary to consider the motion.

REVERSED.

DREHER v. I. S. W. R. Co.

1. **Railroads: RIGHT OF WAY: EVIDENCE.** In an action for compensation for land appropriated by a railway for right of way, evidence relating to the manner in which the railway affected the farm, how it affected a hog pasture and a stream of water and access thereto, the size of the stream, the value of the farm and of the farms in that neighborhood, the height of the grade and the depth of the ditches, etc., was properly admitted.
2. **Practice: QUESTION TO JURY: DISCHARGE WITHOUT ANSWER.** Where the court submitted to the jury, at the instance of the defendant a question, the answer to which could have determined nothing material to the case, and then discharged the jury against defendant's objection, without requiring them to answer the question, *held* no error to justify a new trial.

59	599
88	387
59	599
99	423
101	546
59	599
133	319
59	599
106	635
59	599
113	494
59	599
125	638
59	599
131	631

Dreher v. I. S. W. R. Co.

3. **Railways: RIGHT OF WAY: INSTRUCTION.** The court instructed the jury that they might "consider the fact that this strip of land is taken for the purpose of building and operating a railroad thereon, and any inconvenience, or apprehension of danger, if any, which may arise out of this peculiar use * * *." *Held*, that the jury could not have been misled by the use of the term "apprehension," since the whole tenor of the instruction was to the effect that actual damages alone were to be allowed; and the small amount of the verdict in this case indicates that they were not misled.

Appeal from Audubon Circuit Court.

FRIDAY, OCTOBER 20.

THIS is a proceeding to ascertain the compensation to which the plaintiff is entitled by reason of the appropriation of part of his farm for right of way for defendant's railroad. There was a trial by jury, and a verdict and judgment for plaintiff for \$100, and defendant appeals.

J. L. Stotts, M. Nichols and J. M. & R. W. Griggs, for appellant.

Andrews & Armstrong, for appellee.

ROTHROCK, J.—I. The right of way contains three acres, and is taken off the east end of plaintiff's farm of eighty acres. The railroad runs within about one hundred and fifty feet of the buildings on the farm. The plaintiff claimed that he should be paid \$300, and the defendant claimed that plaintiff should receive \$70. The verdict returned, and which was approved by the court, was \$100, which, it appears to us, was very reasonable under the evidence. The defendant's theory was that plaintiff's farm was only diminished in value by reason of the right of way in a sum corresponding with the actual value of the three acres appropriated. It appears to have been unwilling to allow plaintiff anything for the inconvenience resulting from the building of a railroad with its excavations and embankments along the whole east end of the farm and within one

Dreher v. I. S. W. R. Co.

hundred and fifty feet of the buildings, and allowing the plaintiff but the one crossing required by law.

Nearly all of the evidence offered by the plaintiff was objected to by the defendant, and the objections were overruled. These rulings are assigned as error. This evidence related to the manner in which the railroad affected the farm, and how it affected the hog pasture, and a stream of water and access thereto, the size of the stream, the value of the farm and of farms in that neighborhood, the height of the grade; and the depth of the ditches etc. It is scarcely necessary to say that this evidence of value, description, and location of the farm, and how it was affected by the taking of the right of way and building the road is strictly legitimate and proper.

Objection was made to a question put to the plaintiff as to what kind of crossing is left to cross from his farm into the road. We do not understand from the question, taken in connection with the answer thereto, that this evidence related to a defective crossing constructed by the defendant over its railroad. The railroad had not been completed when the trial was had. Something is said about a bridge in the answer to the question, and the witness appears to have been using a diagram of the premises in testifying, which renders the answer unintelligible.

II. The court submitted to the jury, at the instance of the defendant, the following questions: "what was the actual cash value per acre of the land taken by the defendant, at the time of the appropriation?" The court discharged the jury against defendant's objection without requiring an answer to the question.

2. PRACTICE:
question to
jury : dis-
charge with-
out answer. This action of the court is assigned as error. We think, taking this question standing alone, the refusal to require it to be answered should not lead to a reversal of the case. An answer to it would have determined nothing. It could not have controled the general verdict, because there are other elements of damages in cases of this kind than the mere

Dreher v. I. S. W. R. Co.

value of the land appropriated. In this view, the question was immaterial. If it had also been asked of the jury how much was allowed by them for injury to the remaining premises, there would have been some apparent object in submitting the question.

III. The court instructed the jury that they should take into consideration certain facts, "and every other matter shown in evidence bearing on the question of value." This instruction is claimed to be erroneous. As we have determined that all of the evidence bearing on the question of value was properly admitted, the instruction was correct.

IV. The court instructed the jury that they might "consider the fact that this strip of land is taken for the purpose of building and operating a railroad thereon, and any ^{3. RAILROADS:} right of way: inconvenience or apprehension of danger, if any, instruction. which may arise out of this peculiar use * *."

Objection is made to this instruction because it is said it authorizes the jury to consider remote, consequential, prospective, future, contingent and imaginary damages. The alleged error consists in the use of the word "apprehension," and it is said it is purely a matter of imagination. But taking this and the other instructions together, we incline to think that the court meant exposure to danger. The whole tenor of the instruction is to the effect that actual damages only are allowable. We do not think the jury could have been misled by the use of the word complained of, especially in view of the small amount of the verdict. That exposure of property to destruction by fire, or other dangers incident to the operation of a railroad, are legitimate subjects of consideration for what they are worth in cases of this character, see *Lance v. C. M. & St. P. R. R. Co.*, 57 Iowa, 636. We find no error in the record.

AFFIRMED.

Sears v. Marshall County.

SEARS v. MARSHALL COUNTY.

59 603
•114 24

1. **Void Tax Sale: REMEDY OF OWNER REDEEMING FROM: LIABILITY OF COUNTY.** Where an owner of land redeems the same from a void, tax sale—void because the tax for which the sale was made has been twice paid, once voluntarily, and once by a previous sale of the property he cannot recover from the county the amount paid in redemption. The sale, being utterly void, did not imperil his title, and he had no need to redeem. His remedy was to proceed against the holder of the certificate or tax deed to cancel the void transaction.

Appeal from Marshall District Court.

FRIDAY, OCTOBER 20.

It is averred in the petition that in December, 1873, the plaintiff was the owner of a block of lots in the city of Marshall, and that in September, 1871, a five per cent railroad tax was voted in the township in which the block is situated, and that the tax was levied and placed upon the tax books; that on the 18th of May, 1872, the township trustees certified to the county treasurer that the railroad company had complied with the law, and was entitled to the tax, and that the tax became payable at that time; that in October, 1873, the treasurer of the county sold the said real estate for all taxes then due, delinquent and payable, and issued a certificate of sale to the purchaser; that on the 11th day of May, 1872, the then owner of the land paid "The amount of the said tax of 1871" to the treasurer, and took his receipt, and said payment was duly entered on the tax books; that notwithstanding the sale aforesaid and the payment of the taxes, the treasurer of the county did, in 1878, wrongfully and unlawfully again sell said premises for the said tax of 1871, and issued his certificate of sale to the purchaser; that in order to save his title and rights in the property, the plaintiff was compelled to redeem from the last sale, which he did, under protest, on the 29th day of July, 1879; that he pre-

Sears v. Marshall County.

sented his claim for the amount paid in redemption to the board of supervisors, but said claim was refused and disallowed. Judgment is prayed for the amount paid in redemption and for costs. The defendant demurred to the petition on the grounds: *First*: That the tax for which the premises were sold was not public revenue, but the private claim of the railroad company; *Second*: The tax was paid before the sale of which the plaintiff complains, and the redemption was voluntary; *Third*: The plaintiff, having redeemed from the sale, thereby affirmed its validity, and is now estopped to deny it; *Fourth*: The premises having been sold in 1873, the subsequent sale in 1878 was void, and the plaintiff is not prejudiced thereby; *Fifth*: The sale of 1878 worked no injury to the plaintiff, his title having been divested by the sale of 1873. The demurrer was sustained, and judgment was rendered against the plaintiff for costs. He appeals.

J. M. Parker, for appellant.

J. H. Bradley, for appellee.

ROTHROCK, J.—It seems to be conceded in the argument that the railroad tax is the only subject of contention. According to the averments in the petition, it was paid on the 11th day of May, 1872, some time before it was certified by the township trustees. In 1873, the real estate was sold for the tax, notwithstanding it had been paid in 1872. It is not alleged that there has been any redemption from that sale. In 1878 it was again sold by the treasurer for the same tax. The plaintiff redeemed from this last sale, and seeks to recover of the county the amount paid in redemption. We have then the question whether when a railroad tax has been paid, and the land upon which the tax was levied has been twice wrongfully sold, the owner may redeem from the last sale, and recover the amount paid in redemption from the county.

Leaving out of view the question whether or not a railroad aid tax may under any circumstance be recovered back from

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the county (see *Barnes v. Marshall County*, 56 Iowa, 20), we are clearly of the opinion that where the owner redeems from a void sale—void because the tax for which the sale was made has been twice paid, once voluntarily and again by a previous sale of the property—he cannot recover the amount paid in redemption from the county. He cannot thus make the county his debtor. The tax sale being utterly void, his remedy is to proceed against the holder of the certificate or tax deed, to cancel the void transaction. As exactly in point, see *Morris v. The County of Sioux*, 42 Iowa, 416. It is said, however, that this case is overruled by *Richards v. Wapello County*, 48 Iowa, 507. We do not so understand it. That was a payment of a tax which should not have been assessed, and it was held that it could be recovered back from the county. In other cases cited by counsel for appellant, the taxes sought to be recovered back were erroneous and illegal, but they were nevertheless taxes assessed, levied and paid. The tax payer may, in such case, be required to protect his own property from sale. In this case, as is said in Morris's case: "His title was not imperiled by the sale, and for its protection he was not required to redeem." We think the demurrer to the petition was properly sustained.

AFFIRMED.

Spiesberger Bros. v. Thomas.

SPIESBERGER BROS. V. THOMAS ET AL.

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89 277
59 606
1113 712

1. **Appeal to Supreme Court:** CASES INVOLVING NOT MORE THAN \$100: PROVINCE OF THE COURT. When appeals are taken to this court in cases involving not more than \$100, it is not the province of the court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued, where it is shown affirmatively that they do not arise in the case.
2. **Practice: WRIT OF ERROR:** NO PRESUMPTION WHERE RECORD IS SILENT. A writ of error requires only so much of the record to be certified as is necessary to secure a correction of the error complained of; and no presumption can be indulged in reference to a point about which the portion of the record so certified is silent.
3. **Jurisdiction: JUSTICE'S COURT: AMOUNT IN CONTROVERSY: ATTORNEY'S FEE AS PART OF.** In determining the jurisdiction of a justice of the peace, where a question is made as to the amount in controversy, an attorney's fee, provided for in the note, is not to be considered as a part of the amount in controversy, but is to be treated as costs. Chapter 185, § 2, Laws 1880.

Appeal from Hardin Circuit Court.

FRIDAY, OCTOBER 20.

THIS action was brought before a justice of the peace to recover upon a promissory note. The amount called for by the note was \$91.50, being the principal, \$90, and the accrued interest, \$1.50. The note also provided for an attorneys fee. The court rendered judgment for the plaintiff for \$91.50 as the amount of the note, and for cost taxed at \$12.05, and allowed as a part of the costs an attorney's fee of \$9.15, being ten per cent of the amount allowed upon the note. The defendant removed the case by a writ of error to the Circuit Court, which confirmed the judgment of the justice. The defendant appeals.

J. H. Scales, for appellant.

A. M. Bryson and W. O. Allen, for appellee.

Spiesberger Bros. v. Thomas.

ADAMS, J.—The case comes to us upon a certificate, and the questions certified are in substance as follows: whether upon the hearing of a writ of error the Circuit Court has the right to inquire into the sufficiency of the evidence upon which the justice of the peace predicated his judgment; whether in determining the jurisdiction of the justice an attorney's fee provided for is to be considered as a part of the amount in controversy, or treated as costs; and whether, under the statute, it is absolutely necessary, in order to recover an attorney's fee, that an affidavit should be filed.

We desire to say, by way of introduction, that it is not our province to decide questions certified and not argued, nor

1. ~~APPEAL to supreme court: cases involving not more than \$100: province of the court.~~ questions argued and not certified, nor questions certified and argued, where it is shown affirmatively that they do not arise in the case. The justice rendered judgment for \$9.15 in favor of the plaintiff as an attorneys fee, and it does not appear that any affidavit was filed, and it is shown affirmatively that no evidence was introduced by plaintiff except the note, and that no attorney appeared for plaintiff at the trial.

The statute provides that no attorney's fee shall be taxed except in favor of a regular attorney. Chapter 185 § 3, Laws of 1880. Whether the justice erred because the attorney's fee was taxed in favor of plaintiffs, instead of being taxed in favor of an attorney, we cannot determine, because such question is not certified.

Again, it may be that there should be some evidence, independent of the note, of the value of the services. The defendants contend, and not without some reason, that the statute under which the justice evidently acted was designed merely to fix the maximum limit. But whether he erred in fixing the attorneys fee without any evidence before him except the note, we cannot determinine, because such question is not certified. The question certified as to whether the Circuit Court can, upon a writ of error, inquire into the sufficiency of the evidence upon which the justice rendered

Spiesberger Bros. v. Thomas.

judgment, is well enough, but it does not go far enough. Behind it lies the other question as to whether the evidence in this case is sufficient. To justify us in reversing upon this point, it would be necessary for us to make a ruling upon both questions, but we could not do this without making a ruling upon a question not certified.

We have to say, also, that there is still another question certified which is of such a character that we should not be justified in reversing, though the question should be answered in favor of the appellant. The question is, as to whether, under the statute, it is absolutely necessary, in order to recover an attorney's fee, that an affidavit should be filed. The statute referred to is the same above cited, and requires that a certain affidavit by the attorney engaged in the cause shall be filed before there shall be an allowance of an attorney's fee. But if we should hold for the appellant that an affidavit is necessary, we should not be justified in reversing upon this point, unless the presumption is that none was filed where the record is silent, and, such we think, is not the

2. PRACTICE: writ of error : much of the case to be removed as is necessary record is silent. to secure a correction of the error complained of.

Code, § 3597. The affidavit for the writ should set forth the errors complained of. Code, § 3598. The affidavit for the writ in this case does not set forth that there was a want of the attorney's affidavit. The justice therefore was not required to show in his return whether an attorney's affidavit was filed or not.

The appellant endeavors to meet this point by saying that both the affidavit for the writ and the justice's return show that the plaintiff introduced no evidence except the note. But the attorney's affidavit was not evidence to be introduced by the plaintiff. It is rather a condition precedent, to be performed by the attorney, before an attorney's fee can be allowed in his favor.

But the appellant endeavors further to meet this point by

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saying that it is shows affirmatively that no attorney appeared for plaintiffs at the trial. It would not, however, follow that no attorney rendered any service in bringing the action, or causing it to be brought, and if such service was rendered by an attorney, he may have filed the requisite affidavit.

One question certified and argued seems properly to arise from the record, and is of a determinative character; and that

3. JURISDICTION : justice's court : amount in controversy: attorney's fees as part of. is, as to whether, in determining the jurisdiction of the justice, where a question is made as to the amount in controversy, an attorney's fee provided for in the note is to be considered a part of the amount in controversy, or treated as costs.

The statute expressly declares that it shall be treated as a part of the costs. Section 2 of statute above cited. The amount in controversy, then, was not more than \$100, and the justice had jurisdiction.

AFFIRMED.

STAR WAGON Co. v. SWEZY, LEBO & CO. ET AL.

1. **Practice in Supreme Court: QUESTION NOT BROUGHT UP.** Where plaintiff does not assign an instruction as error, and defendant does not appeal, the correctness of the instruction cannot be made a subject of inquiry in the appellate court.
2. **Instruction: NOT SUPPORTED BY PLEADINGS OR EVIDENCE.** Where in an action on a guaranty a settlement and waiver were pleaded, not as independent defenses, and were not in issue as such, and as independent matters they did not constitute a defense, because they occurred before the guaranty was executed, *held*, that it was error to instruct the jury as though the issues were formed on these matters, especially as there was no evidence whatever tending to show a settlement, or a waiver of the terms of the contract.
3. **Promissory Note: GUARANTY: WAIVER OF NOTICE.** In this case the defendants guaranteed the note in question, waiving notice and protest (see 52 Iowa, 392), and it was error for the court below to instruct the jury that defendants should have had notice of the default of the maker, and that plaintiff could not recover, except upon proof that defendants had suffered no injury or prejudice from want of notice.

Star Wagon Co. v. Swezy, Lebo & Co.

4. — : — : BY MEMBER OF DISSOLVED FIRM. Where a firm was under obligation to execute a guaranty, and one of the members thereof, after the dissolution of the firm, executed it, held that the other members of the firm were bound thereby, and that they should not have been permitted to testify that the guaranty was not authorized by them. See 52 Iowa, 391.

Appeal from Buena Vista District Court.

FRIDAY, OCTOBER 20.

ACTION to charge defendants as the guarantors of a promissory note. Judgment was rendered upon a verdict for defendants. Plaintiff appeals. The case has before been in this court. See 52 Iowa, 391.

Hubbard, Clark & Davy, for appellant.

Robinson & Milchrist, for appellees.

BECK, J.—I. The petition, among other matters, shows that the defendants executed the written guaranty upon the promissory note, which is the foundation of the action, pursuant to a contract whereby they were appointed by defendants agents for the sale of wagons, and were bound to indorse all notes taken upon sales made by them. Upon the cause being remanded, after the decision of the former appeal, defendants filed a substituted answer, which, we understand, supersedes all prior answers. It alleges that the guaranty was signed by one of the partners long after the dissolution of the firm and notice thereof to plaintiff, and without consideration or authority. Another count of the answer alleges that the guaranty was executed after a full and complete settlement between plaintiff and defendants for the notes guaranteed, and after dissolution of the firm and notice thereof; that the notes were delivered to, and accepted by, the plaintiff without the indorsement, in full satisfaction of the claim of plaintiff upon defendants; that, prior to such delivery, plaintiff had stated to defendants that the provisions in the contract between the

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parties requiring the indorsement of notes were frequently waived when the notes were good; that defendants fully understood and believed that plaintiff did waive the conditions of the contract requiring indorsement of the notes; that after the delivery of the notes, they were returned to defendants for collection, and after the dissolution of the firm were taken from defendants; that the maker of the notes was solvent, and continued so to be for a long time, and the note could have been collected; that defendants were led to the conclusion that they were relieved from all obligation on account of the notes, and took no steps to protect themselves, and no claim was made against them by plaintiff until after the maker of the note became insolvent. Upon these facts defendants aver that plaintiff is, and ought to be, estopped to claim against defendants any sum on account of the contract or guaranty. Other matters set out in the pleadings need not be recited.

II. It will be observed that defendants plead an estoppel on account of the facts alleged in the answer as above set out. The answer does not plead a settlement or waiver of the condition of the contract requiring the guaranty. It will be observed that the alleged settlement was before the guaranty; hence, if the guaranty was made upon proper authority, the settlement could not have defeated it. It is not alleged as a fact that there was a waiver of the contract by defendants, but that defendants were led to believe that plaintiff would waive it. It may be stated here more explicitly that the answer shows that all the matters inducing defendants to believe plaintiff waived the contract, as well as the settlement, occurred before the execution of the guaranty. It is plain, therefore, that the defendants did not plead the settlement and waiver as defenses to the action, but as matters supporting the estoppel which is pleaded in the answer.

III. The District Court, in the twelfth instruction, directed the jury to disregard the estoppel pleaded, and all evidence admitted to establish it. Plaintiff does not assign this instruction for error, and defendants do not appeal. The

Star Wagon Co. v. Swezy Lebo & Co.

correctness of the instruction cannot, therefore, in this case, be made the subject of inquiry.

IV. But the District Court, regarding the settlement and waiver set up in defendant's answer as matter supporting the estoppel pleaded therein, as defenses pleaded, directed the jury as though issues had been formed upon these matters. The instructions are erroneous and should not have been given, for the reasons, which we may again state, that the settlement and waiver were not pleaded as independent defenses; they were not in issue as such, and as independent matters they do not constitute a defense, for they occurred before the guaranty was executed.

V. The instructions ought not to have been given for another reason: There is no evidence whatever tending to show a settlement between the parties, or a waiver of the terms of the contract.

VI. In the eleventh instruction, the court below directed the jury that defendants should have had notice of the default of the maker, and plaintiff cannot recover except upon proof that defendants suffered no injury or prejudice from want of notice. The instruction is erroneous, and ought not to have been given. We held upon the former appeal that defendants were not entitled to notice under this identical guaranty.

VII. We also held upon the former appeal that, under the contract between the parties, the partner making the indorsement was authorized to do so for the reason that the act was done in discharge of an obligation upon the firm; "that, while he could not make a new contract, he could perform an old one," after the dissolution of the firm. But the District Court permitted the other partners to testify that the one executing the guaranty was not authorized by them so to do. In this there was error. The absence of authority from other members of the firm cannot invalidate the guaranty.

The foregoing discussion disposes of all questions argued by counsel which need be now decided. The judgment of the District Court must be

REVERSED.

Maxwell v. Graves.

MAXWELL V. GRAVES.

59	615
80	509
59	618
115	376

1. **Contract: MODIFICATION OF: PARTIAL PERFORMANCE: CONSIDERATION.** Where the parties entered into a written contract, and afterwards orally agreed to a modification thereof, and the plaintiff performed his part of the modified contract and the defendant accepted of such performance, the defendant cannot be heard to say that there was no consideration for the modification.
2. **Practice in Supreme Court: IRRELEVANT MATTERS NOT CONSIDERED.** Where the appeal was from an order sustaining a motion to strike out part of an "amended and substituted petition," the appellate court cannot consider the *original* petition and an *amendment* thereto, parts of which are set forth in the argument.
3. **—: QUESTION NOT PASSED ON BELOW.** This court will not entertain a question which was not passed upon in the court below.

Appeal from Palo Alto Circuit Court.

FRIDAY, OCTOBER 20.

THE substance of the petition is, that in September, 1880, the defendant leased and delivered twenty cows to the plaintiff, for three years, by a written contract, by which it was agreed that the plaintiff should keep the cows and their increase in a certain specified manner, and at the end of the three years the stock and increase was to be appraised by disinterested parties, and the defendant was to have the original value of the twenty head of cows, in cows between the ages of three and six years, and each party to have one-half of the remainder; that after the written contract was made and the cows delivered to plaintiff, the contract was modified or changed by a parol agreement, by which the defendant promised that, if any of the cows previously delivered to plaintiff should not have calves in the spring of 1881, the defendant should take them back, and supply their places, under the contract, by delivering to plaintiff an equal number of good cows and calves; that in the spring of 1881, ten of said cows did not have calves, and the parties agreed to make such exchange in

Maxwell v. Graves.

May, 1881; that plaintiff took said ten barren cows to Emmetsburg, and delivered them to defendant according to verbal agreement, but defendant refused to make the exchange, and refused to give plaintiff ten cows and ten calves as agreed upon; that in June, 1881, defendant wholly abandoned the written contract with its verbal modifications, and "took from plaintiff said stock mentioned, and refused to furnish plaintiff other cows instead thereof." Damages are claimed for the alleged failure upon the part of the defendant to make such exchange.

The defendant moved to strike from the petition all that part of it relating to the parol contract made subsequently to the written contract, upon the ground that the parol contract was without consideration. The motion was sustained. The plaintiff elected to stand upon his petition, and he appeals.

John Jenswold, Jr., and T. W. Harrison, for appellant.

Soper & Crawford, for appellee.

ROTHROCK, J.—I. It is argued at some length that there was a consideration for the parol modification of the contract at the time it was made, and the petition alleges that this consideration was that expressed in the original written agreement, and the mutual benefits to be derived by each of the parties by the exchange. We do not feel called upon to determine whether this was a consideration for the modification of the contract or not.

It is averred in the petition, and contended in argument, that the plaintiff delivered the ten barren cows to the defendant in pursuance of the parol change in the contract. If they were delivered, they must have been received by the defendant, and, if received, the plaintiff thereby parted with them. He had been at the expense of keeping them through the winter, and taking them to the place of making the exchange. It is very clear that, even if there was no original consideration

Michaels v. Crabtree.

for the parol modification of the contract, the defendant cannot raise that question after the plaintiff has performed his part of it, and the defendant has accepted such performance. Something is said in argument by counsel for appellee about the original petition, and an amendment thereto, and parts of these pleadings are set forth in the argument. They cannot be allowed consideration in this appeal, because the pleading which was attacked by the motion appears to be "an amended and substituted petition."

II. The motion also made the question that the petition contained two alleged causes of action, and asked that plaintiff be required to separate and divide the same. No ruling was made upon this part of the motion. We are requested by counsel for appellee to determine that question. As it was not passed upon by the court below, we cannot entertain it. We think the motion to strike was improperly sustained.

REVERSED.

MICHAELS v. CRABTREE ET AL.

1. **Venue: SECOND CHANGE OF: STATUTE CONSTRUED.** Where, upon the application of defendants, a change of venue was granted from the Circuit to the District Court, *held* that it was error for the District Court to grant another change of venue on the application of plaintiff, in the absence of a showing that the cause on which plaintiff based his application was not in *existence* when the first change was granted. It was not a compliance with section 2591 of the Code for the plaintiff to allege that the cause on which the application was based came to his knowledge since the last continuance. The statute must be strictly complied with.
2. **— : EXCEPTION TO ORDER OF CHANGE: APPEAL TO SUPREME COURT.** Where an erroneous order was made by the District Court, against the defendants' objection, changing the venue to the Circuit Court, and defendants duly excepted thereto, they did not waive their exception by going to trial in the Circuit Court, and by failing to raise the question again in the Circuit Court on a motion for a new trial or in arrest of judgment. The only way to reach the error was to take the proper exception and appeal from the final judgment.

Michaels v. Crabtree.

Appeal from Marshall Circuit Court.

FRIDAY, OCTOBER 20.

THIS is an action to recover for the alleged breach of contract for the sale of cattle. There was a trial by jury and verdict and judgment for the plaintiff. Defendants appeal.

Brown & Carney and P. M. Sutton, for appellants.

Caswell & Meeker, for appellee.

ROTHROCK, J.—I. The action was commenced in the Marshall Circuit Court in January, 1880. In April of the same year the place of trial was changed to the District Court of the same county, upon the application of the defendants, upon the alleged ground that the judge of the Circuit Court was so prejudiced against them that they could not obtain a fair trial before him. In February, 1881, in vacation, the plaintiff made his application for a change of the place of trial, on the alleged ground that the judge of the District Court was so prejudiced against him that he could not obtain a fair trial before said judge. Notice was given of the application, and it was resisted by defendants. The motion was sustained, and the venue was changed to the Circuit Court of the same county, where a trial was had in October, 1881.

It is urged that the last change of place of trial was erroneously made. It appears that some two terms of the District Court intervened between the time of the change to that court and the application made to change the case from that court. The application set forth that the prejudice of the district judge came to the knowledge of the plaintiff and his witnesses "since the last continuance of this cause." In *Schaentgen v. Smith*, 48 Iowa, 359, it was held that after one change of venue the party applying for another change must allege and show that the cause upon which he bases his ap-

Michaels v. Crabtree.

plication was not in existence when the first change was obtained. This is the construction we then placed on section 2591 of the Code. Counsel for appellant combats the decision in that case, and insists that it is an erroneous construction of the statute. We are content to adhere to it, and do not deem it necessary to again discuss the question. Under the rule in that case the last application was insufficient and should have been overruled.

It is urged that this question cannot be entertained, because the trial was had in the Circuit Court without objection, and the question was not raised on motion for a new trial, or in a motion in arrest of judgment. This did not waive the erroneous order. The proper objection was made when the motion was presented, and the order making the change was duly excepted to. The District Court passed upon the question over defendant's objection and exception, and it was not necessary to ask the Circuit Court to overrule the decision of the District Court. That appellants waived nothing by going to trial in the Circuit Court, see *Furgeson v. Davis County*, 51 Iowa, 220. No appeal could have been taken from the order changing the venue, and the only way to reach the error was to take the proper exception and appeal from the final judgment, *Allerton v. Eldridge*, 56 Iowa, 709. It is said the question as to the construction of the statute was not raised or passed upon by either the Circuit or District Court, and has not been presented by appellants in argument. We do not so understand the record and argument of counsel for appellants. It appears that on the hearing of the motion for the last change it was stipulated that one change had already been granted, and the defendants resisted the motion, and counsel in argument cite *Schaentgen v. Smith, supra*.

While upon this subject, we deem it proper to say that a party desiring a change of venue should be required to bring himself strictly within the statute authorizing such an order. There is nothing in this case to denote but that these parties

Michaels v. Crabtree.

each honestly believed that the judges of the two courts were prejudiced against them, and the presumption must be indulged that the applications were made in good faith. But it is notorious that in many cases these affidavits for change of venue are made, charging the judge with prejudice, when the persons making them know that he is not acquainted with the parties to the suit, and has no knowledge of the matters in controversy. It is a fruitful source of perjury, and is often resorted to for the purpose of accomplishing some other end than that which the statute seeks to attain. Where these aspersions upon the impartiality, and even the integrity, of the judge are so freely indulged in, the law which authorizes it should be fully complied with, leaving nothing to inference or implication.

II. This cause must be reversed for the error above discussed. There are other errors assigned and discussed by counsel. And there are three abstracts and one motion in the case. The record is in a very confused condition—requiring us to resort to the transcript to determine whether appellants have such a record as would justify us in reversing rulings upon the evidence.

In this condition of the case, we cannot take the time to determine the questions raised. If the case should be again tried, and the same rulings made and an appeal taken, there will probably be no contention as to what is of record and what is not.

REVERSED.

The C. & N. W. R'y Co. v. Dunn.

THE C. & N. W. R'Y CO. V. WILLIAM DUNN.

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1. **Railroads: Torts: Liability of one joint wrong-doer to another.** While it is a general rule that no contribution can be enforced as between joint wrong-doers, there are some exceptions to the rule; and where defendant wrongfully removed a gate which plaintiff had erected to keep live stock off its right of way over defendant's land, whereby the horse of a third party got upon plaintiff's track and was killed by a passing train, and plaintiff, on account of its negligence in not having the gate replaced, was compelled to pay the value of the horse to the owner thereof, *held* that plaintiff was entitled to recover of the defendant the amount so paid for the horse.

Appeal from Clinton Circuit Court.

FRIDAY, OCTOBER 20.

THE plaintiff's petition alleges that it is a duly organized corporation, and that during the month of February, 1881, it was operating a line of railway in Clinton county, passing through a farm occupied by defendant; that where plaintiff's railway passes through defendant's farm plaintiff had its right of way fenced against live stock running at large, and had constructed and maintained a private crossing for the accommodation of defendant, and erected gates at said crossing for the purpose of keeping live stock off of its right of way, which gates plaintiff at all times used due care and diligence to keep closed; that on the 20th day of February, 1881, defendant wrongfully removed one of said gates from its hinges, and left the same open, by means whereof a certain horse, belonging to one Martin Engle, got upon the track of plaintiff, and was killed. Plaintiff further states that defendant had wrongfully and willfully committed a trespass upon plaintiff's property, by taking down its said gate, as aforesaid, and that such trespass had been committed about one month prior to the time that the horse of said Engle was killed, and said gate had remained open ever since; that said horse entered upon the track of the railway through the gate so taken down

The C. & N. W. R'y Co. v. Dunn.

by said defendant, and plaintiff says that, as between said Engle and the plaintiff, the plaintiff, as a matter of law, was guilty of negligence in not again putting up said gate, and by reason of such negligence the plaintiff became, and was, liable for the value of said horse, and was compelled to, and did, pay the same to said Engle, to-wit: the sum of \$110, being the fair value of said horse. Plaintiff avers that said horse was killed solely by reason of the trespass committed by said defendant in taking down plaintiff's gate, and that defendant is estopped from setting up the negligence of the plaintiff as to Engle, in his defense. The plaintiff prays judgment for \$110. The defendant's demurrer to this petition was sustained, and judgment was rendered against the plaintiff for costs. The plaintiff appeals.

Hubbard, Clark & Dawly, for appellant.

Aylett R. Cotton, for appellee.

DAY, J.—Under the allegation of the petition, the defendant was guilty of an active wrong. For the purpose of protecting him from injury the company owed him no duty, and was under no obligation. If the defendant's horse had strayed upon the railway through the gate and been injured, he could not, except in a case of gross negligence upon the part of the company, recover therefor. *Russell v. Hanly*, 20 Iowa, 219 (221). The defendant having by his willful act removed the gate, and enabled Engle's horse to pass upon the railroad track and be injured, Engle might have maintained an action directly against the defendant for the injury. See *Russell v. Hanly*, *supra*. But the railway company was passively guilty of a wrong, as to a third person, in permitting the gate to remain down so long a period; hence, the company was under legal obligation to compensate the owner of the horse for the injury. It is claimed that the plaintiff cannot recover of the defendant because the plaintiff is a joint wrong-doer, and because the liability of the plaintiff to pay for the

The C. & N. W. Ry Co. v. Dunn.

horse arose from its own negligence. It is a general rule that no contribution can be enforced as between joint wrong-doers. In Cooley on Torts, after a recognition of this general rule, the following language is employed, "But there are some exceptions to the general rule which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrong-doers to the injured party, yet, as between themselves, some of them may not be wrong-doers at all, and their equity to require the others to respond for all damages may be complete. There are such cases where the wrongs are unintentional, or where the party by reason of some relation is made chargeable with the conduct of others." Cooley on Torts, p. 145.

That the plaintiff's negligence did not constitute the omission of any duty which the plaintiff owed the defendant is apparent from the fact that, if the defendant's horse had escaped through the gate upon the track of the railway and been injured, the defendant would have been without remedy. The case falls fully within the principle of those cases in which it has been held that a municipal corporation, which has been compelled to pay damages to a party injured because of an obstruction upon or excavation in a street, may recover from the party causing the excavation or obstruction. See *City of Chicago v. Robins*, 2 Black., 418; s. c., 4 Wall., 657; *Town of Lowell v. B. L. Ry. Co.*, 23 Pick., 24; *City of Ottumwa v. Parks*, 48 Iowa, 119; *City of Sioux City v. Weare*, 95 ante.

The demurrer was improperly sustained.

REVERSED.

Ellsworth v. Green.

ELLSWORTH V. GREEN, ET AL.

1. **Tax Sale: Redemption: Error of Treasurer.** Where the owner of a certificate of purchase of land at tax sale filed in the county treasurer's office, on the 27th day of November, an affidavit of notice to the owner of the land of the expiration of the time of redemption, but the entry on the tax sale register showed that such affidavit was filed on the 29th day of November, *held* that the owner, in the absence of anything to put him on inquiry as to the true date of filing, was justified in relying upon the entry in the register, and was entitled to redeem the land within ninety days from the 29th day of November.

Appeal from Wright District Court.

FRIDAY, OCTOBER 20.

THIS is an action of *mandamus* to compel the auditor of Wright county to cancel the redemption of certain described lands, and to compel the treasurer of said county to execute to plaintiff a tax deed therefor. The cause was tried to the court and judgment was entered for the defendants. The plaintiff appeals. The material facts are stated in the opinion.

Nagle & Weber, for appellant.

W. S. R. Humphrey, for appellee.

DAY, J.—Although the appellant states that the plaintiff filed his petition in equity, yet the form of the action and the relief demanded show that the action is at law. Code, § 3379; *Dove v. Independent School District of Keokuk*, 41 Iowa, 689. The case discloses the following facts:

“The plaintiff is the owner of a certificate of purchase for forty acres of land, sold on the second day of October, 1876, for the delinquent tax of 1875. He caused notice of the expiration of the period of redemption to C. O. Green, and the unknown owners of said land, to be published for three consecutive weeks, the last publication being November 26th, 1879. On the 27th day of November, the plaintiff handed

Ellsworth v. Green.

thirty-five affidavits of proof of publication, including an affidavit as to the lands in question, to L. P. Davis, who was acting as assistant county treasurer, but not deputized in writing. On twenty-three of these affidavits, including the one made in this case, Davis marked in pencil "filed November 27th 1879." One is marked "filed November, 1879." One is marked "filed November 29, 1879." Ten are not marked at all.

At the time of receiving the affidavits Davis made an entry on the tax sale register showing the date of the expiration of the period of redemption. This entry, at the time of the trial, looked as though it might have been either 27 or 29, or changed from one to the other.

On the 29th day of November, Parker, the treasurer, fastened all the affidavits together, and marked the outside one "Filed November 29, 1879. H. Parker, treasurer." The agent of C. O. Green testifies that he examined the register in January, 1880; that the date was 29, and that it did not look then as at the time of the trial. He further testified that he spoke to Parker about redemption, and Parker said the proof was filed November 29th. On the 26th day of February, 1880, the agent of C. O. Green redeemed the land from tax-sale. Mr. Humphrey, who assisted the auditor and made up the figures from which the redemption was made, examined the sale register, and was unable to tell whether it was 27 or 29. He then called for the affidavit which plaintiff had filed, and was handed the package marked "filed November 29, 1879, H. Parker, treasurer." He computed the time from the date of filing, and finding that ninety days had not expired allowed the redemption. If the time for redemption dates from the 27th of November, it expired on the 25th of February. The owner of the land was certainly justified, it seems to us, in relying upon the records in the treasurer's office, in making redemption.

There was evidence from which the court was justified in finding that the tax-sale register showed, when examined by

Tracy v. Roberts.

the agent of the owner, before making redemption, that the affidavit required by the statute was filed November 29th, 1879, and that there was then no such ambiguity in the date as to put him upon further inquiry. This case is not reviewable *de novo*, but the finding of the court stands as the verdict of a jury.

The court did not err in refusing to order the setting aside of the redemption, and the execution of a treasurer's deed.

AFFIRMED.

TRACY ET AL V. ROBERTS ET AL.

1. Appeal to Supreme Court: IMPROPER PARTIES APPELLANT.

Where a judgment was rendered against the estate of an administrator, he being at the time dead, and an appeal to the supreme Court was taken from such judgment in the name of the administrator and his bondsmen, *held* that the appeal must be dismissed for want of proper parties appellant—the administrator being dead, the cause could not proceed in his name, and there being no judgment against the bondsmen, they could not prosecute the appeal.

Appeal from Guthrie Circuit Court.

FRIDAY, OCTOBER 20.

THE facts are stated in the opinion.

Charles S. Fogg, for appellant.

Charles Harden and E. W. Weeks, for appellees.

SEEVERS, Ch. J.—William Tracy was appointed administrator of the estate of B. F. Cox. From time to time the said Tracy made reports to the court of his doings as administrator, and, as we understand, in 1876 he made what he designated his final report and asked to be discharged. This report was referred by the court to a referee, who, in April

Tracy v. Roberts.

1876, found and reported to the court that said Tracy was indebted as administrator to the estate in the sum of \$390.31. This report was confirmed by the court and no exceptions were taken thereto or to the action of the court. In 1878, the defendant filed a motion asking that a judgment be rendered against said Tracy, and appellants Hobsman and Mortz, who were sureties on his bond as administrator, for the amount found due by the referee. This motion was sustained, and judgment accordingly rendered. Execution was issued on this judgment, and certain real estate belonging to Tracy was sold for the amount of the judgment and costs, and a certificate of sale given the purchaser.

In April, 1879, Tracy, Hobsman and Mortz, filed what is styled a petition in equity and answer to the motion aforesaid. The relief asked was that the judgment be set aside, the sale of the real estate be declared void, and the appellants be allowed to introduce evidence showing that no judgment should be rendered against them. An injunction was also asked and granted. The defendants appeared and answered the pleadings filed by appellants. The cause came on for a hearing, and the court ordered that the judgment be set aside and vacated, and the cause was set down for further hearing. No exceptions were taken to this action of the court. Amendments to the pleadings were filed by the appellants, and the defendants filed a reply in which they asked "that the proceedings heretofore had by this court be not disturbed, and such other and further relief as the court shall deem equitable. Thereupon the cause came on for hearing before the court, and evidence was introduced by both parties. The court found there was a certain amount due from Tracy as administrator, and judgment was rendered against his estate, but no judgment was rendered against the appellants, Hobsman and Mortz.

The judgment recites that Tracy was dead at the time it was rendered, but there is nothing tending to show when he died, or that his administrator, if one was appointed, was made a party to this proceeding. The record shows that

Seaton v. Polk County.

Tracy, Hobsman and Mortz appealed. Such is the singular record before the court, and the case has been argued on what counsel seem to regard its merits. We are at some loss to know what disposition must be made of it. It is clear to our minds that the question argued by counsel cannot be considered and determined, because the proper parties are not before us. It is clear, we think, the Circuit Court had the power and jurisdiction to make the reference, and that the report of the referee when confirmed by the court, in the absence of any exceptions thereto or appeal, is conclusive as to the fact that Tracy was indebted to the estate. Whether judgment was properly rendered on the motion is immaterial, because it has been set aside and no right can be claimed thereunder. The last judgment is not against Hobsman and Mortz, and, therefore, there is nothing from which they can appeal. Whether the judgment against Tracy or his estate is void because the administrator of his estate was not made a party, we have no occasion to determine, as it is clear, Tracy being dead cannot appeal, nor can the right of his estate be adjudicated in this proceedings. The appeal will be

DISMISSED.

SEATON ET AL V. POLK COUNTY.

1. **County: LIABILITY FOR ASSISTANCE TO DISTRICT ATTORNEY: POWER OF DISTRICT COURT TO APPOINT ASSISTANT.** The District Court has no inherent or statutory power, when the district attorney is present, to appoint another attorney to assist him in a criminal prosecution, and thereby to bind the county to pay for such assistance.

Appeal from Polk Circuit Court.

FRIDAY, OCTOBER 20.

HENRY RED was indicted in Polk county and charged with the crime of murder. A change of venue was taken to Jasper county.

Seaton v. Polk County.

The plaintiff, Seaton, appeared as attorney for the State, and brought this action to recover for his services. The claim was afterwards assigned to one Doran who intervened in the action.

Trial to the court, judgment for the defendant, and plaintiff appeals.

Sickmon and Barclay, for appellants.

L. G. Banister, for appellee.

SFEVERS, CH. J.—The District Court of Jasper county made and caused to be entered of record the following order:
“THE STATE OF IOWA } Trial continued. Lee R. Seaton ap-
“vs. } pointed special prosecutor.
HENRY RED et al. }

“It is hereby ordered that Lee R. Seaton, Esq., on the application of Ed. W. Stone, District Attorney, is appointed to assist said District Attorney in the trial of said causes. This appointment being made because it appears to the court, on the representation of the District Attorney in open court, that said Dist. Attorney, owing to the other duties of his office at this term, is unable to try the cause alone, and that the appointment and assistance of said Seaton is necessary to the proper and reasonably speedy trial of this cause, said Seaton to be allowed reasonable compensation at the expense of Polk county.”

And afterwards an order was entered by said court in the following words:

“THE STATE OF IOWA }
“vs. }
HENRY RED et al. }

“It is hereby ordered that Lee R. Seaton, Esq., be paid the sum of \$100 for assisting the District Attorney in the trial of Henry Red, under an order of January 28, 1879, and that the same be paid by Polk county, Iowa.”

The Circuit Court has certified certain questions as to which it is said to be desirable to have the opinion of the Supreme

Seaton v. Polk County.

Court. The only question so certified, which it is deemed material to determine, is whether the court had the power to make the appointment aforesaid, and thereby impose on defendant a liability to pay for the services rendered under the appointment.

A county is not liable for services performed by an attorney at the instance and request of the district attorney. *Tatlock & Wilson v. Louisa County*, 46 Iowa, 138; *Foster & Foster v. The County of Clinton*, 51 Id., 541.

The fact that the district attorney requested the court to appoint Mr. Seaton to assist him, cannot make the county liable. Nor can the united action of the court and district attorney have such effect, unless there is some statute which so provides, or the court has such inherent power in order to prevent a failure of justice. Where the district attorney was temporarily absent from a term of court, it was held in *White v. Polk County*, 17 Iowa, 413, the court could appoint an attorney to appear for the State, and that the county was liable to pay for his services. No such case is before us, but the court, at the request of the district attorney, made the appointment in this case.

The statute provides that the district attorney shall appear for the State in the courts of his district, but that the board of supervisors may employ other counsel when they may deem it necessary. Code, § 205.

We think, under the statute, a county cannot be made liable to pay for additional counsel unless the board of supervisors has determined such counsel was necessary.

In the case before us the court had no such power, because the district attorney was present, and his competency to perform the duties of his office must be presumed and cannot be doubted. There was no reason, therefore, to call into action the inherent power of the court in order to prevent the failure of justice.

Having reached this conclusion, the remaining questions need not be answered.

AFFIRMED.

Burkhart v. Ball.

BURKHART v. BALL.

50	629
82	710
59	629
97	598

1. **Practice in Supreme Court: ABSTRACT NOT DENIED TAKEN AS TRUE.** When the appellee files an additional abstract, which is not controverted by the appellant, such additional abstract will be deemed correct and taken as true, unless the appellant files a paper expressly notifying the court that there is a controversy requiring determination. But this rule is not to be understood as applicable to a case where the appellant's abstract states that it is an abstract of all the evidence, and appellee's abstract denies the truth of such statement.

Appeal from Jefferson Circuit Court.

FRIDAY, OCTOBER 20.

ACTION AT LAW. There was a verdict and judgment for defendant; plaintiff appeals.

Wilson & Rutherford, for appellant.

Leggit & McKinny, for appellee.

BECK, J.—The petition alleges that plaintiff purchased of defendant a farm, paying therefor \$40 per acre; that defendant represented that the farm contained 160 acres; that plaintiff, relying upon such representations, paid defendant \$6,400 for the farm, and that defendant's representations as to the quantity of the land were false and fraudulent; the farm contained $154 \frac{19}{100}$ acres and no more, which was well known to defendant. The petition seeks to recover \$224, being the value of $5 \frac{91}{100}$ acres, the difference in the quantity of land as represented by defendant, and the quantity the farm actually contained. The answer of defendant denied all the allegations of the petition. The plaintiff filed an abstract purporting to contain the pleadings in the case, and a bill of exceptions showing the evidence offered and admitted at the trial, the instruction given to the jury, interrogatories submitted to the jury for special findings, and a motion for a new trial, and

Berkhart v. Bell

the rulings thereon. The defendant filed, in this case, an additional abstract as provided for by rule twenty, showing that plaintiff's abstract is untrue, and that in fact no bill of exceptions was filed preserving and certifying the evidence, and other proceedings alleged in plaintiffs abstract to be set out in a bill of exceptions, and that no such records exist in the court below or are contained in the transcript filed in this court.

The plaintiff does not deny defendant's additional abstract. It must therefore be taken as true. Unless an additional or amended abstract be denied, we will regard it as presenting the record correctly, and will not resort to the transcript to verify its correctness. *Kearney v. Ferguson*, 50 Iowa, 72; *Lucas v. Jones*, 44 Iowa, 298.

The case as presented by the additional abstract contains nothing but the pleadings filed in the court below. The rulings assailed by the assignment of errors are not before us and cannot be reviewed. The judgment of the Circuit Court must be.

AFFIRMED.

ON REHEARING.

ADAMS, J.—Where the additional abstract of the appellee merely presents additional matter, and does not otherwise controvert the correctness of the appellant's abstract, it is evident that we should be justified in assuming that the appellee's abstract is correct. But it is insisted that, where it seeks to eliminate something from the appellant's abstract, it is not to be taken as correct and should have no effect except to send us to the transcript to ascertain what the true record is. The argument is, that the appellee's abstract in such case is in effect a mere denial, and so it ought to be considered that there is an issue, and there being such, the court must resort to the transcript.

Rule twenty, under which the appellee is allowed to file an additional abstract, does not expressly provide what force

Burkhart v. Ball.

shall be given it when filed; but it has seemed to us that it should not primarily be regarded as raising an issue to be determined.

There is no good reason in any case why the appellant's abstract should not be a fair presentation of the case. If it is not such we must presume that it is by reason of oversight or mistake. If the appellee files an additional abstract we must, we think, be allowed to presume in the outset that it is to correct an oversight or mistake. Neither party has anything to gain by a false presentation of the record, because it is within the power of either party to cause the true record to be shown. The rule, then, should be construed so far as it can properly be done, to facilitate the convenience of the parties and the court.

If we should assume, whenever the appellee files an additional abstract which has the effect to controvert some part of the appellant's abstract, that an issue is raised to be determined, we should often put ourselves to the labor of calling for and examining the transcript, when there was no controversy in fact. We have thought, therefore, that we ought to assume that the appellee's additional abstract is correct, and that there is no controversy unless the appellant files a paper expressly notifying us that there is a controversy, and an issue raised for our determination. If the appellant denies the appellee's abstract we should deem ourselves thus notified.

We do not wish to be understood as holding that where the appellant's abstract states that it is an abstract of all the evidence, and the appellee's abstract denies the truth of such statement, we would assume that the statement is untrue.

Upon the question presented in the case at bar we see no reason to depart from the rulings heretofore made. The former opinion is accordingly adhered to, and the judgment is

AFFIRMED.

Patterson v. Jack.

PATTERSON v. JACK.

- 59 632
82 743
59 632
84 282
50 632
86 740
50 632
88 721
59 632
98 387
98 329
59 632
105 145
59 632
113 211
113 632
59 632
119 818
59 632
130 251
59 632
135 596
59 632
141 733
1. **Appeal to Supreme Court: TIME OF PERFECTING.** A notice of appeal to the Supreme Court, filed six months and ten days after the date of the judgment appealed from, is too late under section 3173 of the Code.
 2. **New Trial: MOTION FOR: WHEN MADE.** A motion for a new trial, except on the ground of newly discovered evidence, cannot, under section 2838 of the Code, be made four months after the rendition of the judgment in the case.
 3. —— : **NEWLY DISCOVERED EVIDENCE: AFFIDAVIT.** When a motion for a new trial is made on the ground of newly discovered evidence, it must be supported by affidavit.
 4. **Appeal to the Supreme Court: FROM MOTION IN EQUITY CASE: ERRORS MUST BE ASSIGNED.** When an appeal is taken to the Supreme Court in an equity case from a ruling on a motion or demurrer, errors must be assigned.
 5. —— : —— : **INSUFFICIENT ASSIGNMENT OF ERRORS.** Where, in a motion for a new trial, six grounds are relied on, an assignment of errors in this form: "The court erred in overruling defendant's motion for a new trial, and to modify and amend the decree," is not sufficiently specific.

Appeal from Jasper District Court.

FRIDAY, OCTOBER 20.

This is an action in equity to recover of the defendants, Julia A. and A. J. Jack, damages for an alleged failure to complete according to contract a certain building in the city of Des Moines. The court adjudged that the plaintiff recover of the defendant, Julia A. Jack, four hundred and sixty-two dollars. The defendant, Julia A. Jack, appeals. The facts are stated in the opinion.

Winslow & Wilson, for appellant.

H. S. Wilcox, for appellee.

DAY, J.—The judgment was entered in this case on the 20th day of September, 1881. On the 11th day of January,

Patterson v. Jack.

1882, the defendants filed a motion as follows: "Come now the defendants and move the court for a new trial and examination of the issues in this cause for the following causes affecting the substantial rights of the defendant, to-wit:

"1. Irregularity in the proceedings of the prevailing party by which the defendant was prevented from having a fair trial.

"2. Misconduct of the prevailing party and his attorney.

"3. Accidents which ordinary prudence could not have guarded against.

"4. Error in the assessment of the amount of recovery.

"5. That the decision is not sustained by sufficient evidence, and is contrary to law.

"6. Newly discovered evidence."

This motion was overruled on the 22d day of February, 1882. On the 30th day of March, 1882, the defendant, Julia A. Jack, caused to be served a notice that she "has appealed from the judgment of the District Court in the above entitled cause."

I. Section 3173 of the Code provides: "Appeals from the District and Circuit Courts may be taken to the Supreme Court at any time within six months from the rendition of the judgment or order appealed from, and not afterwards." From the 20th day of September, 1881, when the decree in this case was filed in the court below, to the 30th day of March, 1882, when the notice of appeal was served, is six months and ten days. The appeal was not taken in time to have a review of any of the proceedings which culminated in the decree. No trial *de novo* can be had upon this appeal. See *Cohol v. Allen*, 37 Iowa, 449.

II. If the appeal be regarded as from the order of the court refusing to grant a new trial, the order of the court below must be affirmed for the following reasons:

First. The motion was not made until nearly four months after the judgment was rendered. It was therefore too late to be considered for any cause except the last. Code, § 2838;

Ball, by next friend, v. Miller.

Boardman v. Beckwith, 18 Iowa, 292; *Clinton National Bank v. Graves*, 48 Id., 228.

Second. As to the last ground, newly discovered evidence, it is altogether unsupported by affidavit or otherwise.

Third. When an appeal is taken in an equity case from a ruling upon a motion or demurrer, errors must be assigned. *Powers v. The County of O'Brien*, 54 Iowa, 501. All of the errors assigned relate to matters inhering in the original judgment, except the last which is as follows:

"The court erred in overruling defendant's motion for a new trial, and to modify and amend the decree." In the motion for a new trial, six distinct grounds are relied upon. This assignment of error is not sufficiently specific. See Code, § 3207. The appeal, in so far as it is regarded as an appeal from the principal judgment, is dismissed. The order of the court overruling the motion for a new trial is

AFFIRMED.

BALL, BY NEXT FRIEND, v. MILLER.

1. **Infant: ACTION BY NEXT FRIEND: DISMISSAL BY COURT.** Where an infant brought an action by his next friend, and the court dismissed the action upon the finding of record that "said action is not being prosecuted for the benefit of said minor, and that the further prosecution of said action is not for the best interest of said minor," held that the dismissal was warranted by section 2565 of the Code, and that, in the absence of a showing to the contrary, the findings of the court must be presumed to have been made upon sufficient evidence.

Appeal from Guthrie Circuit Court.

FRIDAY, OCTOBER 20.

Action to recover for the negligence and want of skill of defendants who are surgeons, in treating a broken arm of the infant plaintiff. After answer of defendants denying the allegations of the petition, the court dismissed the action upon

Ball, by next friend, v. Miller.

a stipulation signed by the next friend, who prosecuted the suit for the infant. The plaintiff appeals.

H. E. Long, for appellant.

A. Hill and Charles S. Fogg, for appellee.

BECK, J.—I. The next friend of the plaintiff filed in the court a paper reciting that he was satisfied no recovery could be had in the case, and that there was no valid cause of action, and that it was for the best interest of the plaintiff to dismiss the action. The paper shows the receipt of \$50, paid in consideration of the dismissal of the case and in payment of all claims set up in the petition, and directs the case to be dismissed. The case coming on for hearing upon this paper, the court entered an order dismissing the action upon a finding, entered of record with the order, that “said action is not being prosecuted for the benefit of the said minor, and that the further prosecution of the action is not for the best interest of the minor.”

Code, § 2565 provides that “the action of a minor must be brought by his guardian or next friend; but the court has power to dismiss it, if it is not for the benefit of the minor.”

Under this provision the court was authorized to dismiss the action upon the finding above set out. The correctness of the finding cannot be questioned in this court, as the record does not disclose the evidence upon which it was made. We will presume that it was supported by the facts before the court. The judgment of the Circuit Court must be

AFFIRMED.

State v. Egan.

59 636
108 741

STATE v. EGAN.

1. **Evidence: IMPEACHING WITNESS FOR BAD MORAL CHARACTER: STATUTE CONSTRUED.** In section 3649 of the Code, which provides that "the general moral character of a witness may be proved for the purpose of testing his credibility," the word "*character*" means *reputation*; and testimony offered which did not relate to the reputation of the witness as to moral character, but was intended to show his moral character as known to the witness, independent of reputation, was *held* properly excluded.

Appeal from Polk District Court.

FRIDAY, OCTOBER 20.

DEFENDANT was convicted of keeping a gambling house, and now appeals to this court.

Sickmon & Barclay, for appellant.

Smith McPherson, Attorney-general, for the State.

BECK, J.—I. A witness testified upon the trial on behalf of the State, and defendant sought to impeach the evidence by proof tending to show that he was a man of bad morals. The testimony offered did not relate to the reputation of the witness as to moral character, but was intended to show his character as known to the witness independent of reputation. The evidence was excluded, and the court below held that the impeaching testimony must be confined to the general reputation of the witness as to morals. The ruling was correct. If a witness could be impeached by proof of his moral qualities as known to the witness called to discredit him, it would involve endless inquiry into the truth of the matter upon which the opinion of his moral qualities is founded, and would demand issues to be tried touching the life, practices and dealings of the witness; for, surely, a witness could not be assailed in this way without an opportunity to vindicate him-

State v. Egan.

self. For this, and other reasons, the law has always confined impeaching evidence to the reputation of the witness whose testimony is brought in question.

II. Council for appellant rely upon Code, § 3649, which provides that "the general moral character of a witness may be proved for the purpose of testing his credibility." The word "character" as used means *reputation* according to one of the definitions of the word. The general reputation may, therefore, be shown under this section.

The object of the provision was to change the common law rule restricting impeaching evidence to proof of reputation for want of truth and veracity. *Carter v. Cavanaugh*, 1 G. Greene, 171. Under that rule, the general reputation as to morals, the moral character of a witness, could not be shown; the section quoted permits the general moral character to be made the subject of inquiry. Under the old law a witness could be impeached only by showing a reputation for want of truth; under this statute he may be impeached on the ground of bad moral character—reputation.

III. No other question is discussed by counsel. We have considered the whole record of the case and find no ground for disturbing the judgment of the District Court. The evidence sufficiently supports the verdict of the jury.

AFFIRMED.

Kimball v. Wilson.

9 638
6 218
9 638
6 360
9 638
8 488

KIMBALL V. WILSON.

1. **Homestead: ABANDONMENT OF: FACTS CONSTITUTING.** Where a person had a homestead in the country, but left the same and, with his family, moved to town to engage in the practice of law, intending to reside permanently in town if he succeeded in his practice, otherwise to return to his country home, *held* that these facts showed an intention to abandon the homestead, qualified only by a contingency which the owner intended to avoid, and that the removal from the homestead, with such an intention constituted an abandonment in the contemplation of the law.
2. **Practice in Supreme Court: DEFECTIVE ABSTRACT OF EVIDENCE: PRESUMPTION IN FAVOR OF TRIAL COURT.** Defendant insisted that plaintiff's claim to the land in question was defeated by the return on a certain execution which the abstract says was introduced in evidence, but which does not appear in the abstract of evidence before this court. Said execution and return, however, defendant says, appear in the abstract as an exhibit to his answer. *Held* that the exhibit to the answer, though not denied by plaintiff, could not be accepted as evidence, and that, it not appearing to this court what is contained in the return referred to, it must be presumed that it contained nothing inconsistent with the judgment rendered by the trial court.

Appeal from Warren Circuit Court.

FRIDAY, OCTOBER 20.

ACTION to quiet title to part of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 26, township 74, range 25, west. The plaintiff avers that he is the owner of the same by virtue of an execution sale and sheriff's deed. The defendant, W. M. Wilson, avers that he is the owner by purchase and conveyance from one N. E. Wilson. There was a decree for the plaintiff. The defendant appeals.

Todhunter & Hartman and W. M. Wilson, for appellant.

H. W. Maxwell and A. L. Kimball, for appellee.

ADAMS, J.—Both parties claim through N. E. Wilson. The execution sale to the plaintiff was made upon a judgment

Kimball v. Wilson.

against N. E. Wilson, rendered by a justice of the peace, but a transcript of which was filed in the Circuit Court before the debtor sold and conveyed the land to the defendant. It follows that the plaintiff's title must prevail, unless the fact is as the defendant claims, that the premises at the time of the execution sale were exempt from execution. It is undisputed that, from a time prior to the rendition of the judgment until after the execution sale, the premises constituted the execution debtor's homestead. The plaintiff insists, however, that the premises were not exempt for the reason that the debt upon which the execution sale was made was contracted prior to the time when the homestead character attached. The fact appears to be that the debt was for a part of the purchase money. The plaintiff's position, then, must be sustained, unless there was a partial exemption by reason of the fact that the premises were purchased in part with the proceeds of a former homestead. The defendant contends that they were. We come then to the determination of this question of fact. It is

1. HOME-
STRAD: aban-
donment of :
facts consti-
tuting. shown clearly enough that the premises were pur-
chased in part with the proceeds of a farm of forty
acres, which was at one time the execution debt-
or's homestead, and was such at the time of its sale, unless
at that time it had been abandoned as a homestead. The
farm is in Warren county, and was occupied by the debtor
and his family until May, 1873, when he and his family
moved to Indianola, the county seat of Warren county,
where he entered upon the practice of law. The sale of the
farm was effected about a month later. The removal consti-
tuted an abandonment unless it was designed to be temporary.
As to what the design was, we have the testimony of the debtor
himself. He says: "I came to town to follow my profession
as a lawyer, and made an engagement with H. McNeil. I do
not think that I arrived at any conclusion as to whether I
would return to the farm or not. I intended to go back to
the farm if I could not make a living here." From this it is
abundantly evident that his purpose was to reside in town

Kimball v. Wilson.

and pursue his profession permanently if he was able to make a living by it. We find then, an intention to abandon qualified by a contingency. But the contingency was one which the debtor intended to avoid. The removal with such intention, we think, constituted an abandonment.

The new homestead, then, being liable for the plaintiff's debt, the judgment thereon became a lien from the time the transcript was filed in the Circuit Court. *Hale v. Heaslip*, 16 Iowa, 451; *Bills v. Mason*, 42 Iowa, 330; *Phelps v. Finn*, 45 Iowa, 447. The defendant took his conveyance after such lien attached. He took it then subject to a lien. He could protect himself only by redeeming. But his right to redeem expired in a year from the time of the execution sale. The plaintiff's title then became absolute.

One question remains to be considered. The defendant contends that there is a defect in the plaintiff's proof. He

2. PRACTICE
in supreme
court: defec-
tive abstract
of evidence:
presumption
in favor of
trial court. says that the sheriff's return upon execution shows a sale of land in the SE. $\frac{1}{4}$ of section 25, instead of in the SW. $\frac{1}{4}$, in which is the land in question. To this we have to say that we are unable to discover from the evidence what the return shows. The abstract does not purport to contain a copy of the return as introduced in evidence. It contains a mere statement that there was introduced in evidence, "Execution and return, Exhibit C, being execution on judgment of *Hilliard v. N. E. Wilson*." Now it may be that the return shows what the defendant claims it does, but we are not allowed to take his statement for it. We must presume that it sustained the decision.

In this connection we ought, perhaps, to say that we find in the abstract what purports to be a copy of the return showing what the defendant claims it does. But this appears to be a mere copy attached to an amendment to the defendant's answer. Such copy is not evidence.

It is true that the return fails to show a sale of the land in dispute, and in support of the averment sets out what the

Brown v. Davis.

defendant claims is a copy of the return, and the amendment does not appear to be replied to. We do not think, however, that the averment can be considered as admitted. The plaintiff had averred in his petition that the land in question was sold to him upon execution. This was sufficient without denying that it was not sold. The defendant should simply have taken issue upon the plaintiff's averment. He could not, by an averment as to what the return shows and what it does not show, make a reply necessary. In our opinion, the decree of the Circuit Court must be

AFFIRMED.

BROWN V. DAVIS, SHERIFF, ET AL.

1. **Jurisdiction: JUSTICE'S COURT: CONSENT OF PARTIES.** Where the makers of a note for more than \$100 consented by writing in the body of the note that judgment might be taken thereon before any justice of the peace in Dallas county, held that, although the note was payable in Polk county, yet, as a justice of the peace could have jurisdiction only by consent, and as the consent was limited to justices of the peace in Dallas county, a judgment rendered on the note by a justice of the peace of Polk county was void for want of jurisdiction, and that execution thereon was properly enjoined.
2. **— : — : PRESUMPTION IN FAVOR OF.** While it may be conceded that, under section 3669 of the Code, a decision of a justice of the peace that he has jurisdiction is presumed to be right till the contrary is shown, yet when, as in this case, it appears on the face of the record that he had not jurisdiction, the presumption is rebutted.

59	641
109	49
59	641
6127	504
59	641
134	54
59	641
140	555

Appeal from Polk Circuit Court.

SATURDAY, OCTOBER 21.

THE plaintiff prays a writ of injunction to restrain the enforcement of a judgment, rendered by C. H. Turner, a justice of the peace of Des Moines township, Polk county, for three hundred dollars and costs, upon a note purporting to be executed by the plaintiff and J. M. Link, Hampton Horton

Brown v. Davis.

and L. F. Nicholls, a transcript of which judgment was filed in the office of the clerk of the Circuit Court of said county. The petition alleges that at the time of the rendition of said judgment all the defendants therein resided in the counties of Dallas and Madison, and that the justice who entered said judgment had no jurisdiction in the premises. A copy of the note upon which the judgment was entered is attached to and made a part of the petition. Upon the presentation of the petition to the court a temporary injunction was granted.

Afterward the defendants demurred to the petition, and moved the court to dissolve the temporary injunction. The demurrer and motion were overruled, and, the defendants refusing to further plead, the injunction was made perpetual. The defendants appeal.

Macy & Sweeny, for the appellant.

John Leonard, for the appellee.

DAY, J.—The note upon which the judgment in question was recovered, omitting the signatures, is as follows:

“No. 14972. \$225. DATED, DES MOINES, AUGUST 8, 1877.

“On or before the first day of December, 1879, for value received, we or either of us, of De Soto postoffice, county of Dallas, State of Iowa, promise to pay to the Aultman & Taylor Company or order, two hundred and twenty-five dollars, payable and negotiable without offset at the office of Elliot & Randall, with interest at ten per cent per annum until paid; and if the whole or any part remains at maturity, ten per cent attorney’s fee to be due as soon as placed in attorney’s hands for collection, and we consent that the same shall be entered up as part of the judgment: without relief from the appraisalment, stay or exemption laws. We also expressly covenant and agree that the title to the Aultman & Taylor machine, for which this note is given, shall remain in the Aultman & Taylor company until the note is fully

Brown v. Davis.

paid. The drawer and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note. We also consent that judgment may be taken upon this note before any justice of the peace in said county.

If this note is paid in full when due a discount of dollars is to be made from the amount then due.

Dealers' names: Elliot and Randall.

Dealers' postoffice: Des Moines."

The note sued upon, it may be conceded, is payable at Des Moines, thus conferring upon a justice of the peace in the township in which Des Moines is situated, territorial jurisdiction in a suit brought upon the note. Code, § 3513. *Klingel v. Palmer*, 42 Iowa, 166. No justice of the peace anywhere, however, could have jurisdiction over the amount due upon the note in controversy, unless by consent of parties. Code, § 3508. As the makers of the note could have declined to consent that any justice of the peace should have jurisdiction over the amount of the note, it follows that they might limit this assent to a particular justice or to a particular class of justices. No justice of the peace of Polk county, without the consent of the makers of the note in question, could have jurisdiction of an action brought to recover the amount. If, then, Turner had jurisdiction to render the judgment in question, it can be predicated upon no other ground than that the makers of the note agreed that a justice of the peace of Polk county should have jurisdiction.

The portion of this note material to this controversy is as follows: "We, or either of us, of De Soto postoffice, county of Dallas, State of Iowa, promise to pay to the Aultman & Taylor Company, or order, two hundred and twenty-five dollars. * * * We also consent that judgment may be taken upon this note before any justice of the peace in said county." No county is named in the note but the county of Dallas.

The consent that judgment may be taken before any justice of the peace of said county can have no other meaning

Brown v. Davis.

than that judgment may be taken before any justice of the peace of Dallas county. This clearly confers no jurisdiction upon a justice of the peace of Polk county. Appellant insists that the judgment of the justice finds that consent was given to the extent of three hundred dollars, and that the plaintiff could avail himself of an error in the finding only by appeal. The justice's judgment simply recites that "plaintiff filed for suit a promissory note executed by defendants for two hundred and twenty-five dollars, with interest and attorney's fees, and giving justice of the peace jurisdiction to extent of three hundred dollars." It is thus apparent that the consent relied upon in the judgment is only that contained in the note which was sued upon. Appellant relies upon section 3669 of the Code, which provides that "The future proceedings of all officers and of all courts of limited and inferior jurisdiction, within this State, shall like those of a general and superior jurisdiction be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared."

Under this section, however, a court of inferior jurisdiction cannot acquire jurisdiction over a subject matter, by simply declaring that it has such jurisdiction. In *Pursly v. Hayes*, 22 Iowa, 11 (33), it is said: "If jurisdiction has once attached, then the presumption obtains in favor of all the subsequent proceedings, and mere irregularities or defects will not avail collaterally. * * * The right to decide is one thing and the decision itself is quite another. For the right to decide arises only when there is jurisdiction, and, unless it exists, no right can follow from it." It may be conceded that, under section 3669 of the Code, a decision of a justice of the peace that he has jurisdiction is presumed to be right until the contrary is shown. *Church v. Crossman*, 49 Iowa, 444 (449). But in this case the justice based his decision upon the consent given in the note, which, as we have seen, did not confer jurisdiction upon him. The presumption in favor of the justice's jurisdiction is therefore rebutted. A judg-

Smith v. Marland.

ment of a justice in an action in which the amount claimed exceeds one hundred dollars is a nullity. *Galley v. County of Tama*, 40 Iowa, 49.

It appears upon the face of the judgment in question, in connection with the note upon which the judgment was rendered, that the justice, without the assent of the maker of the note, rendered judgment for three hundred dollars and costs. Under the authorities above cited, we think this judgment must be treated as a nullity. The demurrer to the petition and motion to dissolve the temporary injunction were properly overruled.

AFFIRMED.

SMITH v. MARLAND.

1. Promissory Note; UNCERTAINTY AS TO AMOUNT; NEGOTIABILITY.

The note in question was given for a corn crusher, and contained a provision that the "payee or his indorsee has full power to declare this note due and take full possession of said property at any time they may deem themselves insecure, even before the maturity of this note, and sell the same where this note is payable, on five days notice in writing;" held that this provision rendered uncertain the amount which might be recovered on the note, and that the note was, therefore, not a negotiable note, and that a defense which would have been good as against the original payee was good against his indorsee.

59	645
83	226
59	645
93	197

59	645
144	724

Appeal from Polk Circuit Court.

SATURDAY, OCTOBER 21.

THE plaintiff brings this action as indorsee of an instrument in writing purporting to be signed by the defendant, as follows:

"On or before the 15th day of November, 1879, for value received in corn grinder and crusher, I, the subscriber, of Beaver township, Polk county, Iowa, promise to pay to the

Smith v. Garland.

order of H. Holden or bearer, \$170, at Des Moines, Iowa, with ten per cent interest per annum from date, until paid, together with reasonable attorney's or collector's fees, if collected by suit or otherwise after due. And it is agreed, if suit is instituted on this note, that any justice of the peace shall have jurisdiction to the amount of \$300.

"I own 160 acres of land in my own name in 33 section, Beaver township, in the county of Polk, State of Iowa, which is worth at a fair value \$3,200. It is not encumbered by mortgage or otherwise, except to the amount of \$500, and the title is perfect in me in every respect. I have stock and personal property to the amount of \$600, unencumbered.

"This statement is made and signed by me for the purpose of obtaining the property for which this note is given. The express condition of the sale and purchase of the personal property for which this note is given is such that the title, ownership, or right of possession does not pass from the payee of this note or his indorsee until this note, with interest and costs, is paid in full, and the said payee or his indorsee has full power to declare this note due and take full possession of said property at any time they may deem themselves insecure, even before the maturity of this note, and sell the same when this note is payable, on five days notice in writing; makers and indorsers of this note waive protest, notice of protest and non-payment of this note."

The defendant filed an answer, the second count of which is as follows: "That at or about the time the instrument sued upon purports to be executed, to-wit: November 15th, 1879, the H. Holden mentioned and described in the petition offered and endeavored to sell to defendant a machine, known as a corn grinder and crusher, such as is described in the petition, at and for the price of \$70. The defendant declined and refused to buy or agree to buy said machine, and did not buy the same. That on the next day said Holden, for the purpose and with the intent to cheat, wrong and defraud defendant in the manner herein stated, again came to the farm of

Smith v. Maryland.

defendant, in Beaver township, Polk county, Iowa, bringing with him a machine such as is above described. That said Holden represented to defendant that he was agent for the sale of said machines; that he wanted permission to leave said machine on the premises of defendant for the purpose of exhibiting it, and effecting sales to other neighbors of defendant; that, relying upon the truth of said statements, and not suspecting any trick or design to defraud, defendant granted such permission. That, therefore, said Holden, in pursuance of his scheme and purpose to defraud, requested defendant to give him a receipt in writing, showing that said machine still belonged to said Holden, and that he was entitled to take it away whenever he called for it, and thereupon the said Holden exhibited to defendant a paper or writing, stating and representing, falsely as defendant now believes and charges, the same to be a receipt, as above described, and requesting defendant to sign the same. The defendant refused to sign and did not sign the same, and offered as one reason therefor that he could not write. That thereupon said Holden requested defendant to try if he could not write, and stating that he would teach him to write, placed before defendant some pieces of blank or waste paper, and urged the defendant to practice writing thereon, stating and representing them to be blank and waste paper.

"The defendant not suspecting any trick, or design to cheat and defraud him, thereupon wrote his name several times on various pieces and scraps of said paper then lying about before him, supposing and believing he was simply writing his name on blank or waste paper. The defendant is a German, unaccustomed to the transaction of business, and cannot read or write English; that there was no one at, near or about the premises other than said Holden, that could read or write English; that defendant did not agree to or with said Holden or with any other person, to execute the instrument sued upon—or any other instrument for the payment of \$170, or of any other sum greater or less than that amount, in con-

Smith v. Marland.

sideration of the machine described therein, or for any other consideration; that defendant did not buy or agree to buy said machine, and was in no manner indebted to said Holden; that he did not intend to execute said instrument or any other promise for the payment of money; that if his name is signed to the said supposed note described in the petition, it was written unintentionally, and without the knowledge of defendant, at the time of writing his name on waste paper, as above stated, and was procured to be written by the false, fraudulent and wrongful statements, representations and conduct of said Holden above set forth, whereby defendant was deceived and led to believe he was writing his name on waste paper, or by some trick or device of said Holden whereby, unknown to defendant, said Holden wrongfully substituted the same for, and falsely represented it to be waste paper, for the purpose and with the intent to cheat, wrong and defraud defendant into writing his name thereon, under the belief that he was writing on waste paper.

"The defendant charges that the conduct, acts, statements, and representations of said Holden, as above stated and set forth, were false and fraudulent and were made in pursuance of a scheme for the purpose and with the intent to cheat, wrong and defraud defendant, by falsely making it appear that he had bought said machine, and by his false, fraudulent and wrongful manner, and in the manner above set forth, to cheat, wrong and defraud defendant by procuring his name to be written on the instrument sued upon; that defendant did not suspect any trick or device to defraud, and relying upon the truth of said representations, and the good faith of his conduct and acts, was deceived thereby; that defendant has not been guilty of any negligence in the premises; that the instrument sued upon is not his note, and he is in no manner bound thereby."

The plaintiff demurred to the answer as follows: "The cause of action sued upon is a negotiable promissory note, and, as alleged in the petition, was transferred to plaintiff for a

Smith v. Maryland.

valuable consideration before maturity, and without notice of any defense, and the said second count does not controvert the said allegation of the petition, nor is it alleged in said count that the plaintiff had any knowledge of the fraud set forth in said counts at or before the time of the purchasing of said note by him." The court overruled this demurrer. The plaintiff elected to stand upon his demurrer, and judgment was rendered against him for costs. The plaintiff appeals.

Crom. Bowen, for appellant.

Wishard & Reed, for appellee.

DAY, J.—We need not determine whether the matters set up in the answer would avail against the *bona fide* holder for value of a negotiable promissory note. In our opinion the instrument sued upon in this case is not a negotiable promissory note. The qualities essential to a negotiable promissory note are that it shall possess certainty as to the payor the payee, the amount, the time of payment and the place of payment. 1 Parsons on Notes and Bills, page 30.

Respecting the certainty as to the amount the following language is employed: "There should be entire certainty and precision as to the amount to be paid. The reason for this is especially obvious; for if the note is to represent money effectually, there must be no mistake as to the amount of money of which it thus takes the place and performs the office. On this point, therefore, the cases are quite stringent. The sum must be stated definitely and must not even be connected with any indefinite or uncertain sum, nor are we aware of any trustworthy cases in which the rule, *Id certum est quod certum reddi potest*, is permitted to supply the want of an express certainty on this point, as it seems to be in relation to some other certainties required in promissory notes." 1 Parson on Notes and Bills, p. 37. Now whilst the amount to be paid is stated with certainty in one part of the instrument

Atherton & Ricker v. Marcy.

sued upon, it is rendered uncertain by the provisions which follow. The instrument contains a provision that the payee may at any time he deems himself insecure, even before the maturity of the instrument, take possession of the property in consideration of which the instrument was executed, and sell it on five days' notice. If this privilege should be exercised it is clear that the amount to be recovered on the instrument would be diminished by the amount for which the property was sold. As the instrument contains an express provision whereby the amount to be recovered upon it may be rendered uncertain, it cannot be said that it is certain as to amount. The instrument lacks the most important requisite of a negotiable promissory note.

The matters alleged in the answer constitute a complete defense between the immediate parties to the instrument, and are equally available against a *bona fide* holder. The demurrer was properly overruled.

AFFIRMED.

ATHERTON & RICKER v. MARCY.

59 650
f141 364

1. **Promissory Note: consideration: agreement for extension of time.** Where defendant's father was indebted to the plaintiffs on a promissory note which was about to fall due, and defendant, in consideration of a six months' extension of time on the original debt, made his own note therefor payable six months from date, *held* that the agreement to extend the time was sufficient consideration to support the new note. It was not material that the extension of time was agreed upon and made without the concurrence or request of the father.

Appeal from Sac District Court.

SATURDAY, OCTOBER 21.

ACTION upon a promissory note. The defenses were that the note was executed without any consideration, and that it

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had been fully paid. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

Zane & Helsell, for appellants.

Chas. D. Goldsmith, for appellee.

ROTHROCK, J.—I. The plaintiffs were merchants, and the defendant claims that they held a note on his father for goods sold, and that, when the note became due or about due, the plaintiffs procured the defendant to give the note in suit for the debt; that the note in controversy was payable in six months; that he gave this note without any request from his father to do so, and without any consideration moving to defendant.

The plaintiffs claimed on the trial that the original debt was the joint debt of the defendant and his father; that they both purchased the goods, and that the claim was due, and the plaintiffs extended the time of payment for six months on consideration that defendant would give the note in suit. Among other instructions to the jury the court gave the following;

“5. The defendant claims that the note in suit was given for a debt due from his father to the plaintiffs, and that he himself never received any consideration or benefit for giving the same. The plaintiffs claim that the defendant executed the note in question to procure the extension of time on a debt due them from defendant’s father. If you believe from the evidence before you, that defendant’s father was indebted to the plaintiffs, and that the plaintiffs requested the defendant to execute the note in suit for the debt, there would be no consideration for the same, and your verdict should be for the defendant.

“6. If, however, you believe that the note in suit was made by defendant in payment of goods purchased by him of the plaintiffs, or you think from the evidence that the defendant’s father was indebted to the plaintiffs, and that the debt was

Atherton & Ricker v. Marcy.

due or about to become due, and he wished to procure an extension of time thereon, and that the note in suit was made by the defendant to procure an extension of time on his father's debt, and the extension of time was granted, that would be a sufficient consideration for the making of the note, and your verdict should be for the plaintiffs.

"7. In further illustration of the rule of law that I have just read to you, I will say that, when one party is indebted to another and the indebted party desires the time for the payment of his debt to be extended, that is, where he desires that the payment of the debt may be put off for six months or a year, or any other time, then any third party who comes forward and executes a note in order to get the time extended for the debtor, receives a benefit or a good consideration in law for the making of his note, and will be held to the payment thereof. So in this case, if the defendant made this note in order to extend or to procure an extension of time on some debt due from his father to the plaintiffs, that will be a good consideration for the note, and you must find that he is owing that amount to the plaintiffs, unless you find from other evidence in the case that he has already paid it."

We think the above instruction which is numbered five is erroneous in its statement of what was claimed by the plaintiffs. It is there stated that the plaintiffs claim that the note in question was executed by the defendant on a debt due them from defendant's father. If this claim was made, it was outside of the record. The only evidence introduced by the plaintiffs on that subject was to the effect that the goods which formed the consideration of the original debt were purchased by the defendant *and* his father.

The three instructions taken together directed the jury that, if the original debt was the debt of defendant's father, and the note in suit was given by the defendant at the solicitation of the plaintiffs, but without a request from the father, there was no consideration and the verdict should be for the defendant

Atherton & Ricker v. Marcy.

In other words, that, if the original debt was the debt of the father and he made no request for the extension of time, then the note executed by defendant was without consideration.

It appears that a debt due from a third person is a good consideration for a note, and when the note is executed upon an agreement between the parties thereto, that time on the original debt shall be extended, the consideration is sufficient, even where the note is executed without the request of the original debtor. Parsons on Notes and Bills, Vol. 1, 195.

And "the forbearance of a debt due from him who makes or transfers the note, or of the debt of another at his request, need not even be at the instance of the person liable to be sued." Id., 198.

The rule of the instructions under consideration appear to be inconsistent with that just cited, and we think they are erroneous. Indeed they are not in harmony with the fundamental rule that any benefit to the promisor, or any prejudice or inconvenience to the party to whom the promise is made, is a sufficient consideration to support a promise or contract. In this case if the plaintiffs, as the consideration for the note, agreed to forbear to proceed to collection of the original debt, the consideration was sufficient.

REVERSED.

Aultman, Miller & Co. v. Heiney.

AULTMAN, MILLER & CO. V. HEINEY ET AL.

- 59 654
81 519
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106 588
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113 425
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114 293
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118 728
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1141 495
1. **Fraudulent Conveyance: DELAYING CREDITORS: INTENTION AND RESULT.** To make a debtor's transfer of property fraudulent as respects his creditors, there must be an intent to defraud, express or implied, and an act which, if allowed to stand, will *actually* defraud them by hindering, delaying, or preventing the collection of their claims. Consequently, where a debtor, though with the intent on his part to defraud his other creditors, conveys all his real estate, including his homestead which was not liable for his debt, to one of his creditors for a *bona fide* consideration, exceeding by \$700 the value of the property conveyed, after deducting the value of the homestead and the incumbrances upon the property, *held* that the grantee had a right, for the purpose of securing his claim, to accept the conveyance, that the transaction did not, in fact, hinder or delay the other creditors of the grantor, and that the conveyance could not be set aside as fraudulent.

Appeal from Warren Circuit Court.

SATURDAY, OCTOBER 21.

This is an action in equity to set aside a conveyance of real estate as in fraud of creditors. The petition alleges that on March 4, 1879, plaintiffs obtained a judgment against George W. Heiney, for \$116.40, on a promissory note dated July 14, 1877, which judgment is unsatisfied; that at the time of giving said note the said George W. Heiney was the owner of certain lands in the petition described, and that on October 14, 1878, for the purpose of cheating and defrauding his creditors, and especially to defeat the collection of plaintiff's note, he fraudulently made a quit claim deed of conveyance for said lands, being all the lands owned by him, to the defendant, Eli Heiney; that said deed was without consideration, and for the purpose of placing the property of George W. Heiney beyond the reach of his creditors, of which intent said Eli Heiney had notice, and intended to aid said George W. Heiney therein, by accepting said conveyance; that on October 30, 1878, Eli Heiney and wife made a quit claim deed for said lands to W. M. Davis, a brother-in-law

Aultman, Miller & Co. v. Heiney.

of said George W. Heiney, which deed was without consideration, and for the purpose of still farther aiding said George W. Heiney to evade the payment of his debts; that on October 11, 1879, the defendant, W. M. Davis, and wife, conveyed by quit claim deed said lands to B. F. Heiney, which was recorded, September 28, 1880; that said deed is without consideration, and made to further aid said fraudulent design of said George W. Heiney, of which said B. F. Heiney had notice at the time of taking said conveyance; that part of the land, so conveyed was the homestead of said George W. Heiney; that B. F. Heiney is a son of said George W. Heiney, and has always resided and still continues to reside with his father on said homestead; that at the time said George W. Heiney made conveyance of said premises he was largely indebted to divers persons, and, on the day before the deed was filed for record, he mortgaged all his personal property and placed it beyond the reach of his creditors. The answer denies all the allegations of fraud contained in the petition. The court found that the conveyance from George W. Heiney to Eli Heiney, from Eli Heiney to W. M. Davis, and from W. M. Davis to B. F. Heiney, were all made with the intent to hinder, delay, and defraud the creditors of George W. Heiney, and that they did hinder and delay his creditors. The court declared the conveyance void, and decreed that the judgment of plaintiffs be a lien upon the premises in question. The defendant appeals.

Seevors & Samson, for appellants.

Henderson & Berry, for appellees.

DAY, J.—The evidence is voluminous, and it is not practicable to do more than set forth the material facts which, in our opinion, it establishes.

On the fourteenth of July, 1877, the defendant, George W. Heiney, executed a promissory note to the plaintiffs for \$100, on which they recovered judgment, March 4, 1879, for

Aultman, Miller & Co. v. Heiney.

\$116.44, and attorney's fees and costs, upon which execution issued, and was returned December 12, 1879, unsatisfied, no property being found on which to levy. On the fourteenth day of October, 1870, the defendant, George W. Heiney, conveyed, by quit-claim, to his brother, Eli Heiney, of Marion county, Indiana, all the real estate by him then owned, including his homestead, being four hundred acres of land, the property now in controversy. The consideration of the conveyance was \$10,000, which was about the actual value of the land. In payment of this sum, Eli Heiney assumed a mortgage upon the land for \$5,000, canceled a *bona fide* indebtedness to himself from George W. Heiney for \$2,895.78, and executed his note for \$2,104.22, which he subsequently, and before the commencement of this suit, paid. At the time of this conveyance, George W. Heiney was indebted to various parties in a sum largely exceeding his ability to pay. Eli Heiney knew that his brother was indebted, but did not know that he was insolvent. His purpose in purchasing the property was to obtain payment of the debt due himself, and not to hinder, delay, or defraud the creditors of George W. Heiney.

The conveyance from George W. to Eli Heiney was filed for record, October, 29, 1878. On the thirtieth day of October, 1878, and before the possession of the property was changed, Eli Heiney conveyed the property in question to W. M. Davis, a brother-in-law of George W. Heiney, for the consideration of \$10,500. Davis assumed the payment of the \$5,000 mortgage, and executed three promissory notes, all dated October 30, 1878. One for \$1,000, due March 1, 1878, one for \$2,000, due March 1, 1880, and one for \$2,500, due March 1, 1881. In November, 1878, the defendant, B. F. Heiney, then not quite twenty-one years of age, rented the farm from his uncle, and was to pay \$800. On the eleventh day of October, 1879, Davis conveyed the land in question to B. F. Heiney, for the consideration of \$10,500. B. F. Heiney assumed the payment of the \$5,000 mortgage, and ex-

Aultman, Miller & Co. v. Heiney.

cuted two notes, one for \$2,500, due October 11, 1881, and one for \$3,000, due October 11, 1882. Davis has paid Eli Heiney the \$2,500 note, and B. F. Heiney has paid him the other two notes for \$1,000 and \$2,000. There is one view of this case which, in our opinion is decisive of it, and it is the only view of it which we deem it necessary to consider. The petition alleges, and the proof shows, that the forty acres of land in question constituted the homestead of George W. Heiney.

The evidence shows that the homestead was worth \$2,800. The homestead was not liable for the unsecured debts of George W. Heiney, and conveyance of it could not be set aside as in fraud of the right of creditors. *Delashmut v. Trau*, 44 Iowa, 613; *Officer & Pusey v. Evans*, 48 Id., 557; *Griffin v. Sheley*, 55 Id., 513; *Baldwin v. O'Laughlin* (Minn.), 11 N. W. Rep., 77.

Deducting the value of the homestead and the amount of the incumbrance upon the property, there is left but \$2,200, which is almost \$700 less than the debt due Eli Heiney. Eli Heiney had a right, for the purpose of securing payment of the debt due him, to accept a conveyance from Geo. W. Heiney, even although he knew that George W. Heiney was in debt to other creditors and was prompted by a fraudulent motive in making the conveyance; and the conveyance could not be set aside, merely by showing such knowledge, unless the grantee also participated in the fraud. See *Chase v. Walters*, 28 Iowa, 460, and cases cited in argument of the appellee.

Under the foregoing authorities the conveyance of the property, other than the homestead, was clearly valid, as it was of less value than the incumbrance upon it, and the debt due to Eli Heiney.

Whatever may be the intent of a conveyance, it cannot be set aside as in fraud of creditors, unless it does, in fact, hinder or delay them in collecting their debts. Upon this subject in *Baldwin v. O'Laughlin, supra*, the following lan-

Wells v. Chapman.

guage is employed: "To make a debtor's transfer of property fraudulent as respects his creditors, there must be an attempt to defraud, express or implied, and an act, which, if allowed to stand, will actually defraud them by hindering, delaying, or preventing the collection of their claims. Whatever may be the debtor's intent, when there is no act which will have this effect, the creditors are not damaged or defrauded." Now as the property conveyed in this case, over and above the incumbrance thereon and the debt due Eli Heiney, constituted the homestead of George W. Heiney, and was not liable for his debts, it follows that a conveyance of it did not hinder or delay his creditors, and that it cannot be set aside as fraudulent. See *Delashmut v. Trau*, *Officer & Pusy v. Evans*, *Griffin v. Sheley*, and *Baldwin v. O'Laughlin*, *supra*.

As the conveyance to Eli Heiney was valid and entirely divested the title of George W. Heiney, it is unnecessary to inquire into the nature of the subsequent conveyances. The court erred in decreeing the conveyances to be fraudulent.

REVERSED.

WELLS v. CHAPMAN.

59	658
87	127
59	658
90	704
100	708
59	658
1100	567
59	658
111	511

1. **Chattel Mortgage: TERMS OF: FORECLOSURE BEFORE DEBT DUE: EXECUTION AGAINST MORTGAGOR.** Where a chattel mortgage provided that the mortgagor might, whenever he chose so to do, take immediate possession of the mortgaged goods and sell the same in satisfaction of the mortgage debt; *held* that the mortgagor might assert the right thus given when the goods were seized by an officer upon execution against the mortgagor, even though the mortgage debt was not then due, and that, after the assertion of such right, there was no interest left in the mortgagor which was subject to execution.
2. ———: **LEVY OF EXECUTION ON MORTGAGED CHATTELS: NOTICE TO OFFICERS: INDEMNIFYING BOND.** Where an officer had levied an execution on mortgaged chattels, and the mortgagor gave written notice to the officer that he was the owner of the chattels by virtue of a chattel mortgage, and that he demanded the immediate return of the chattels to the place from which they had been taken by the officer *held*

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that such notice was sufficient, under § 3055 of the Code, to render the further possession of the goods by the officer wrongful, and to entitle the officer to demand an indemnifying bond, and to render him liable to a personal action under said section of the Code.

Appeal from Polk Circuit Court.

SATURDAY, OCTOBER 21.

This is an action for the recovery of damages for the alleged unlawful conversion of certain personal property. It is averred in the petition that the property was taken by virtue of an execution against one L. Wells, in favor of Lord Stoughenburg & Co. That the plaintiff was the owner thereof by virtue of a chattel mortgage executed and delivered by said L. Wells to the plaintiff. It is further averred that, after the goods were seized by the defendant, the plaintiff served upon the defendant a notice of ownership and demand for a return of the goods.

Copies of the mortgage, and of the notice and demand are exhibited with the petition.

There was a demurrer to the petition which was overruled, and the defendant failing to plead over, judgment was rendered against him, and he appeals.

Finkbine & McClelland, for appellant.

Sickmon & Barclay, for appellee.

ROTHROCK, J.—I. The amount in controversy being less than one hundred dollars, the circuit judge has certified certain questions upon which it is said an opinion of this court is desired. The first of these questions is as follows: “Did L. Wells, the mortgagor of the chattel property referred to in the petition, and being in the possession thereof under the terms of the mortgage attached to said petition, * * * have an interest therein which could be levied on and sold under execution?”

Counsel for appellants contend that this question should be

Wells v. Chapman.

answered in the affirmative, because the debt secured by the mortgage was not due when the property was levied upon, and the mortgagor having the right of possession, and the mortgage being a mere lien, the property could lawfully be seized and sold as the property of the mortgagor, and the mortgagee, when his debt became due, could follow the property and foreclose the mortgage.

Whether the mortgagor of chattel property has in any case such an interest in the mortgaged property as may be sold on execution, we need not determine in this case. We must be governed by the stipulations contained in this mortgage. It contains the following provision:

“And I, the said Lewis Wells, do hereby covenant and agree to and with the said D. N. Wells, that, in case of default made in the payment of the above mentioned promissory note, or in case of my attempting to dispose of, or remove from said county of Polk, the aforesaid goods and chattels or any part thereof, or whenever the said mortgagee shall choose so to do, then and in that case it shall be lawful for said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods and chattels, wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with all reasonable costs pertaining to the taking, keeping, advertising, and selling of said property. The money remaining after paying said sums, if any, to be paid on demand to the said party of the first part. Said sale to take place in the city of Des Moines, in the county of Polk, and State of Iowa, after giving at least ten days’ notice thereof, by posting up written notices in three public places in said county.”

Under this stipulation the mortgagee had the right, whenever he should “choose so to do,” to take possession of the property and foreclose the mortgage, whether the debt was due or not. He chose to assert that right when the property

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was seized by the defendant, and when he asserted his right there was no interest left in the mortgagor which was subject to execution. It is proper to observe that the mortgage was duly recorded, and was notice to the defendant, and the whole world.

Under the provisions of a mortgage like this it is immaterial whether the title to the mortgaged property be in the mortgagor or mortgagee. The rights of the parties are made plain by the instrument itself, and the rule here announced is, in our opinion, not inconsistent with any case determined by this or any other court.

II. Two other questions are certified which may be considered together. They are as follows:

“2. Was the notice served by the plaintiff on defendant and set out as Exhibit ‘A’ to plaintiff’s petition, such a demand by plaintiff of the possession of said mortgaged property as to render the further possession of said property by defendant wrongful?”

3. “Was said notice set out as Exhibit ‘A’, to plaintiff’s petition sufficient notice to entitle the officer, defendant, to require an indemnifying bond under § 3055 of the Code, and to render him liable to a personal action under the provisions of that section?”

The notice and demand which was served upon the defendant by the plaintiff are contained in an instrument of which the following is a copy:

“*To Thomas Chapman:*

“ You are hereby notified that I am the owner of all the goods, wares and merchandise this day levied upon by you in case of *Lord Stoughtenb^urge & Co. v. L. Wells*, and that I am such owner by virtue of a certain chattel mortgage recorded in Polk county records, in Book No. 92, page 405 thereof, and that I demand of you the immediate return of said goods to the place from which you took the same, and in case of your non-compliance I shall sue you for the value thereof.”

It is also averred in the petition that the defendant had

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actual notice of the plaintiff's interest in the property before the levy was made. If under these circumstances any demand was necessary, we think the demand above set forth was sufficient.

It is claimed that it is not a demand that the possession be delivered to the plaintiff, but a demand that the goods be returned to the place from whence they were taken. This position we think cannot be maintained. The demand was to return them to a certain place. The person to whom they were to be delivered was not designated, nor was it necessary to do so. We think the demand was a sufficient indication that the plaintiff intended to proceed to a foreclosure of his mortgage.

It is urged that the notice of ownership was insufficient, because it shows on its face that the property did not "belong" to the plaintiff within the meaning of § 3055 of the Code. We do not think the law should have any such a restricted construction. The notice sets out that the plaintiff is the owner by virtue of the chattel mortgage, and we think the notice sufficiently evinces the purpose and intention of the plaintiff to claim his right of possession, and present right of foreclosure provided for in the mortgage.

The court below having held in accordance with the views herein expressed, the judgment will be

AFFIRMED.

Ebersole & Son v. Ware.

EBERSOLE & SON V. WARE.

59	663
117	146
59	663
d132	25
j132	29
59	663
142	162

1. **Justice's Court: JURISDICTION: RESIDENT PARTNERSHIP AND NON-RESIDENT PARTNERS.** A partnership may be sued before a justice of the peace of the county where it exists, and service upon a resident partner will give the justice jurisdiction of the partnership, and, upon such service, a judgment against the firm as such may be enforced against the partnership property, and that of such members as have appeared or been served with notice; but where an action is brought for the recovery of money against the members of a firm as individuals, the justice has no jurisdiction to render judgment against a member who resided and was served with notice in another county, except on a written contract for the payment of money in the township where the suit is brought.
2. **Appeal to the Supreme Court: POINT NOT MADE BELOW NOR ARGUED ON APPEAL.** Where the point involved in a question certified on appeal to the Supreme Court does not appear from the record to have been made in the court below, and is not argued on appeal, it will not be considered.

Appeal from Calhoun Circuit Court.

SATURDAY, OCTOBER 21.

THIS is an action upon a book account for \$90. Suit was originally commenced before a justice of the peace against the appellant and one O'Connor. O'Connor accepted service of the original notice and made default, and judgment was rendered against him. The suit was commenced in Calhoun county, and the original notice was served on the appellant in Dubuque county. On the return day the appellant appeared before the justice of the peace, and moved that the action be dismissed as to him upon the ground that he was an actual resident of Dubuque county, and never had been a resident of Calhoun county, and the court therefore had no jurisdiction as against him. The motion was overruled, and appellant was held to be in default, and judgment was rendered against him. The cause was removed to the Circuit Court by writ of error, and the judgment of the justice was affirmed. Defendant appeals.

Ebersole & Son v. Ware.

Hurd & Daniels, for appellant.

M. D. O'Connell, for appellee.

ROTHROCK, J.—The amount in controversy being less than \$100, the Circuit Court has certified the following question upon which it is said it is desirable to have the opinion of this court.

I. “Does the jurisdiction of a justice of the peace in and for Calhoun county, Iowa, embrace a suit for the recovery of money against a firm, and the individual members of said firm, when the firm had its permanent and only place of business in said Calhoun county, and one member of said firm was an actual resident of said Calhoun county, and the other member an actual resident of Dubuque county, Iowa, on a simple account for goods, wares and merchandize, alleged to have been sold to, and work and labor alleged to have been performed for, said firm, and said member of said firm so actually residing in Dubuque county, Iowa, was served with the original notice in said suit in said Dubuque county, and not in Calhoun county, and said member of said firm residing in Calhoun county having been served with the original notice in said Calhoun county, and said actual resident of Dubuque county appeared before the justice upon the return day, and filed a motion to dismiss the action as to him for want of jurisdiction, and showing his residence by affidavit; that is, has such justice jurisdiction in such case to render judgment against such actual resident of Dubuque county, Iowa?”

It is proper to say that the record made by the justice does not show that any judgment was demanded against a partnership, and no such judgment was rendered. So far as appears from the record, the demand was a joint demand made against the two defendants to the action, and the judgment rendered was against them not as a partnership, but as individuals. A partnership may be sued before a justice of the peace of the county where it exists, and service upon a resident partner will give the justice jurisdiction of the partnership, and upon such

Ebersole & Son v. Ware.

service "a judgment against the firm as such may be enforced against the partnership property, and that of such members as have appeared or been served with notice. But a new action may be brought against the other member on the original cause of action." Code, § 2553.

But because a justice of the peace thus acquires jurisdiction of the partnership and of the members served, it does not follow that his jurisdiction extends over alleged partners who are non-residents of the county. If so, a person may be sued as a partner in any county of the State before a justice of the peace, and compelled to attend and submit to a trial as to whether or not he is a partner, as well as his general liability upon the claim made. And all this because it is charged that he is a member of a partnership over which the justice of the peace has jurisdiction.

Section 3507 of the Code fixes and defines the jurisdiction of justices of the peace as follows: "The jurisdiction of justices of the peace, when not specifically restricted, is co-extensive with their respective counties, but does not embrace suits for the recovery of money against actual residents of any other county, except as provided in section three thousand five hundred and thirteen of this chapter."

Section 3513 provides that, "On written contracts, stipulating for payment at a particular place, suit may be brought in the township where the payment was agreed to be made."

This is a suit for the recovery of money as against the defendant. He was made a party for no other purpose than to obtain a personal judgment against him on a money demand, and, as we understand section 3507 of the Code, the justice of the peace had no jurisdiction over him. See *Boyer v. Moore*, 42 Iowa, 544; *Hamilton v. Millhouse*, 46 Id., 74; *Gates v. Wagner*, Id., 355.

It can make no difference whether the non-resident be charged as a partner, or as a mere joint obligor, or in any other capacity. If the suit be for the recovery of money, the justice of the peace has no jurisdiction of him, and this, it seems to

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us, cannot be made plainer than the very language of the statute makes it. No other construction can be given to the law as written therein.

II. Another question has been certified which involves the inquiry whether or not a writ of error was the proper remedy to test the question as to the jurisdiction of the justice of the peace. It does not appear from the record that any motion was made to dismiss the proceeding in the court below upon this ground, and, as appellee does not claim in argument in this court that the remedy should have been other or different, but argues the case upon its merits, we do not feel called upon to determine the question.

AFFIRMED.

STANLEY ET AL. V. NOBLE ET AL.

59 666
83 527
50 666
89 482

1. **Administrator: SALE OF REAL ESTATE: PETITION FOR: JURISDICTION.** In a petition by an administrator *de bonis non* for leave to sell real estate to pay debts, the allegations that no personal property had come into his hands, and that there were debts remaining unpaid, were a sufficient compliance with the provisions of section 2375 of the Revision. (Code, § 2388.) Whether such compliance was necessary to give the court jurisdiction of the cause, *quere?*
2. — : — : — : — . The law confers upon the probate court jurisdiction over the subject-matter of such applications; and where the petition was entertained and a sale consummated thereunder, the court must have determined that the petition was sufficient, and the correctness of such determination cannot be questioned in a collateral proceeding.
3. — : — : NOTICE: JURISDICTION. Under section 2376 of the Revision, which provides that before any order can be made for the sale of real estate to pay debts of decedent, "such notice as the court may prescribe must be given to all persons interested in such real estate," held that the court had jurisdiction to determine that the notice and the service thereof were sufficient, and that such determination, though erroneous, cannot be attacked in a collateral proceeding.
- 4 — : — : LIMITATION OF TIME: JURISDICTION. The question whether an application by an administrator to sell real estate to pay

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debts was made in due time is not jurisdictional in its nature. Though the court should have rejected the application as being too late, the error did not render the proceedings and sale void for want of jurisdiction. It should have been corrected on appeal, and cannot be collaterally attacked.

Appeal from Dallas Circuit Court.

SATURDAY, OCTOBER 21.

The plaintiffs are the heirs at law of Adam Rickett, deceased, and brought this action to recover certain real estate belonging to the said Rickett at his decease. The defendants claim to own the real estate in controversy, their title being based on a conveyance by the administrator *de bonis non* of the deceased. The court found in favor of the defendants and dismissed the petition. The plaintiff appeals.

A. R. Smalley, for appellant.

White & Wooden and Nourse & Kauffman, for appellee.

SEEVERS, Ch. J.—I. Adam Rickett died intestate in 1857. Mary Rickett, his widow, shortly after his death was appointed administrator of the estate. She resigned in 1865, and one Abbot was appointed administrator *de bonis non*. He filed a petition asking leave to sell the real estate for the payment of debts. Such a sale was ordered, and the deed to the purchaser approved by the court in 1866. The defendant claims under such conveyance the case can be best disposed of by considering the objections made to such title. It is conceded by counsel for the appellants, if the probate court had jurisdiction when the sale of the real estate was ordered, the title of the defendants cannot, at this late day, be set aside in this collateral proceeding.

It is said an application to sell real estate by an administrator can only be made after a full statement of all claims against the estate, and after rendering a full account of the

Stanley v. Noble.

disposition of the personal estate. Rev., § 2375. To say the least, it is doubtful whether this is a jurisdictional question. *Cooper v. Sunderland*, 3 Iowa, 114; *Morrow v. Weed*, 4 Id., 77. But waving this point, it appears quite satisfactorily from the record that it was alleged in the petition asking an order to sell, that no personal estate had come into the hands of the administrator *de bonis non*, and also that there were debts remaining unpaid. This, clearly, was sufficient under the statute; the petition in other respects being sufficient to invoke and give the court jurisdiction of the subject-matter.

II. Conceding the court had jurisdiction of the subject-matter, it is said that it did not have jurisdiction of the 2 ____: ____ plaintiffs, because they were not named in the pe- ____: ____ tition. The petition was entitled as follows: "W. S. M. Abbot, adm'r *de bonis non* of the estate of Adam Rickett, deceased, vs." etc. Petition to sell land.

"The unknown heirs of said estate."

This was followed by allegations as to the subject-matter. In *Read et al. v. Howe et al.*, 39 Iowa, 553, the court said: "The subject-matter is within the jurisdiction of the court. That the law confers. This jurisdiction is called into exercise by the filing of a petition and the service of a notice. The court, of necessity, must determine the sufficiency of the petition." The court determined the petition to be sufficient, and this determination cannot be attacked in this collateral proceeding. Besides this, how are we to know that the statement that the heirs were unknown was not all the plaintiff could truthfully state. It is said the record of the court at least showed the name of the widow of the deceased. But this is immaterial, as it was for the court to determine whether the heirs were unknown. In the ruling made, the court may have committed a grave error, but its jurisdiction was in no manner affected thereby. It is suggested no guardian *at litem* was appointed for the defendants. The conclusive reply to this is, there is no evidence in the record tending to show they were minors.

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III. It is objected the notice is insufficient to give the court jurisdiction: Because, *first*—it means a different decedent. The notice described the deceased as ^{2. — : — : —} Adam “Ricketts.” The name of the deceased, ^{notice: Juris-} ^{diction.} in some places in the record, is spelled thus: “Ricket,” in others, “Rickett;” and in the petition to sell, and notice, “Ricketts.” In the order of the court directing notice to be given, the name is spelled as “Ricket,” and also as “Ricketts.” Under these circumstances, we think the designation of the deceased in the notice was sufficient. The second objection to the notice is that no land is described therein, and the third that it is directed to no defendant by name. The notice was directed to “the heirs and legal representatives” of said estate, and did not describe specifically any land, but stated application had been made to sell the land belonging to the estate. The statute then in force provided the notice should be such as the court may prescribe, and must be given to all persons interested in the real estate. Revision, § 2376.

In *Shawhan v. Loffer*, 24 Iowa, 217, the notice was directed: “To all interested in the estate of Benj. P. Shawhan,” and such designation of the defendants was held sufficient upon the principle well stated by Beck, J., as follows: “If it appears there was a notice, though defective, or the service thereof be imperfect, neither in strict compliance with the directions of the statute, and the court determined in favor of the sufficiency of such notice and service, which is shown upon the record, even though such determination was erroneous, the judgment of the court will not be held void in a collateral proceeding; it is competent for the court to determine the sufficiency of the notice and service.” Now, in the case at bar, the court ordered “due notice to all concerned of the pendency of the petition” should be given, and in relation thereto the court found and entered of record: “And it appearing to the satisfaction of the court that service of notice of the pendency of this application has been made

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pursuant to the direction of this court heretofore made," etc. Here is found an express determination of the sufficiency of the notice and service thereof. Under the rule announced in *Shawhan v. Loffer*, and the authorities there cited, such determination is conclusive, and cannot be attacked in a collateral proceeding.

IV. The order of sale was made nine years or more after the death of Adam Rickett, and we are aware of the ruling in

4. — : — : *McCrary v. Tasker*, 41 Iowa, 255. But that was limitation of time : jurisdiction. an appeal from the decision of the court refusing to make the order. It was made, therefore, in a direct proceeding. Here the question is whether the court had the jurisdiction and power to make or refuse an order to sell, and not whether it was erroneous. To our minds the question whether the order was made in due time is not jurisdictional, but at most simply erroneous.

AFFIRMED.

59 670
98 711

THOMPSON V. SILVERS, HOFFMAN ET AL.

1. **Practice: GARNISHMENT: EXAMINATION OF GARNISHEE IN COURT.** A garnishee who has answered the statutory questions propounded by the sheriff may, if properly notified so to do, be compelled under the statute to appear before the court or a referee, and submit to a further examination.
2. — : — : **HUSBAND AND WIFE: EVIDENCE.** A wife who is garnished on execution against her husband is not excused from answering questions as to whether she is indebted to her husband, or has money or property belonging to him.
3. — : — : **REFUSAL TO ANSWER.** Where garnishee, after answering the statutory questions propounded by the sheriff, was summoned before a referee for further examination, and she appeared but refused to answer, the plaintiff may, under § 2984 of the Code, have been entitled to judgment against her; but since he did not then move for such judgment, or having moved, did not insist upon a ruling on his motion, but procured an order for her appearance in court for further examination, held that, after such order, she had a right to assume that no judgment could be entered against her until such examination had been

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completed, and such facts had been elicited therefrom as would sustain the judgment. Also held that, upon an appeal to this court from the ruling of the court below, excusing the garnishee from answering further, judgment cannot be rendered here against her, although the rulings of the court below are reversed.

4. Practice in Supreme Court: ABSTRACT: BILL OF EXCEPTIONS.

Where appellant's abstract contains matter which it could not properly contain unless a bill of exceptions had been filed by him, this court will regard the appellant as claiming that such bill of exceptions was filed, and the abstract will not be stricken from the record on appellee's motion, simply because it does not state that a bill of exceptions was filed. If in fact no such bill was filed, appellee should have taken advantage of the omission by setting it up in an additional abstract.

Appeal from Ringgold District Court.

SATURDAY, OCTOBER 21.

THIS is a proceeding in garnishment against the defendant, M. A. Hoffman. The plaintiff holds a judgment against the defendant, John N. Hoffman, a member of the firm of Silvers & Hoffman. Upon his judgment he caused execution to issue, and caused M. A. Hoffman, wife of John N. Hoffman, to be garnished. The statutory questions were propounded to her by the sheriff, all of which she answered in the negative. Afterward a referee was appointed to examine her further. She appeared before the referee and answered one question, stating in substance that she was not indebted to the execution defendant. The referee then proceeded to interrogate her specifically concerning certain real and personal property, but she refused to make further answers, and the referee so reported to the court. The plaintiff then moved for an order requiring her to answer, and the court ruled that she be brought into court, and fixed a day for her examination. On the day fixed she appeared and the plaintiff by his counsel proceeded to interrogate her, but, under the advice and objections of her counsel, she refused to answer, and the court ruled that the objections were well taken, and discharged her

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from making further answers, and discharged her as garnishee, to all which the plaintiff excepted. He now appeals.

Whiffin & Brown, for appellant.

Keller & Spence and *Askren*, for appellee.

ADAMS, J.—The objections interposed by the appellee's counsel were that she had already answered the statutory questions, and that the testimony sought to be elicited was against her husband, the execution defendant.

In our opinion neither of the objections was well taken. The statute expressly provides for the additional examination by the court after the garnishee has answered the statutory questions to the sheriff, if the plaintiff notifies the garnishee to appear in court for that purpose. The garnishee in this case was not only notified at the time of the garnishment to appear, but was afterward expressly ordered to do so by the court. Without any question, we think the plaintiff was not precluded, by the fact that the garnishee made answers to the sheriff, from prosecuting the examination further if he saw fit.

We come then to consider whether the garnishee was exempt from answering because her answers, if they had disclosed an indebtedness to her husband, or property in her hands belonging to her husband, would have been testimony against him. It would not be contended, of course, if her answers had been unfavorable to the plaintiff, that they would have been testimony against her husband. The objection must be deemed to be predicated upon the theory that her answers might have been favorable to the plaintiff, and such as would have justified the court in charging her as garnishee. We have then to determine whether such a result would have been against the execution debtor's interest. To hold that it would, would be to hold that

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it is his interest to be allowed to conceal his property and thereby evade the payment of his just debts. Now the law, we think, does not recognize that such is his interest. The debtor ought to use all his property which is not exempt, in the payment of his debts, and the law cannot recognize that to be his interest which is not right. We may assume, indeed, that the execution debtor desires that the garnishee should be charged if the facts are such as to justify it. He sustains no adversary relation in this proceeding.

We think that the case must be remanded for a further examination of the garnishee if the plaintiff sees fit to make it. The only doubt we have is as to whether we ought not to go further and direct that, without examination, judgment ~~s. — : —~~ should be rendered against her for the amount of ~~refusal to~~ answer. The plaintiff insists that we should, because it appears that, after the garnishee refused to make full answers to the referee, he moved for judgment, basing his motion upon the fact of such refusal. He calls our attention to § 2984 of the Code, which provides that if the garnishee, when duly summoned and his fees tendered when demanded, fail to appear and answer the interrogatories propounded to him, without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demands, and shall be dealt with accordingly. Now, while the garnishee did not fail to appear before the referee, she did fail to answer and, as the referee stood in the place of the court, fully authorized to take her answers, we are not prepared to say that she did not by reason of her failure become liable. If the plaintiff had simply stood upon his right to a judgment, we might have felt constrained to hold that he was entitled to it. But without taking any ruling upon his motion he proceeded to obtain, and did obtain, an order for her appearance in court, and proceeded to make an examination of her in court. Now, from the time such order was served upon her, we think that she had a right to assume that no judgment could be

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rendered against her until such examination had been had. The order was based upon the theory that, if her examination in court should fail to disclose any indebtedness upon her part, or property in her hands, she would be entitled to be discharged. The plaintiff, after proceeding upon such theory, cannot, we think, be allowed to insist that she was in no event entitled to be discharged. He has, by taking the order and proceeding under it, made considerable cost. He cannot now, we think, be permitted to say that he is entitled to judgment, regardless of the result of the proceedings in which such costs have been made. We think he must abide by their result.

The conclusion reached in this case requires us to rule upon a motion filed by the appellees. They moved to strike <sup>1. PRACTICE
in supreme
court: ab-
stract: bill of
exceptions.</sup> the appellant's abstract, stating as grounds therefor that it shows that no bill of exception was filed. Without denying that, if the abstract showed affirmatively that no bill of exceptions was filed, the motion should be sustained, we have to say that it simply fails to show that one was filed. The question presented then is as to whether we are justified in assuming that one was filed.

The appellant cannot of course properly show to us what was not made of record. When, therefore, the abstract contains matter which it could not properly contain unless made of record, we must, we think, regard the appellant as claiming that it was made of record. If so, a direct statement to that effect by him is not necessary.

The general practice, it is true, has been to make such statement in the abstract, but the practice has not by any means been invariable in this respect. Such statement is often omitted. Yet the question is now raised, we believe for the first time, as to whether the abstract should be stricken from the files for want of such statement, there being no claim or pretense on the part of the appellee that the record is in fact defective.

It appears to us that the appellees in this case have no good ground of complaint, unless the fact is that no bill of

Roberts v. Campbell.

exceptions was filed, and, if such is the fact, they could easily have taken advantage of it by setting it up in an additional abstract; and such, we think, would have been the correct practice. The motion must be overruled and the judgment.

REVERSED.

ROTHBROCK, J.—I concur in the result reached in the foregoing opinion, but prefer to put the case upon the single ground that the proceeding in garnishment is against the wife alone, and the husband is not a proper party to be joined with her. When she was called upon to answer as garnishee her answers, whatever they might be, would not be against her husband, but against herself. It seems to us that the opinion, impliedly at least, concedes that a wife may be put upon the stand as a witness by a party opposed to the husband and examined as a witness. Where the husband is a party in the sense that her testimony may be against him, the law will not allow her to be called and examined as a witness; no matter what her testimony may be, she is disqualified as a witness unless called by her husband. Code, § 3641.

ROBERTS v. CAMPBELL.

1. **Specific Performance: EVIDENCE CONSIDERED.** Plaintiff sues for the specific performance of an agreement to convey land, but the testimony failing to show what the agreement really was, *held* that the court erred in decreeing a conveyance as prayed.
2. **Mechanic's Lien: AVERMENTS NECESSARY IN PETITION TO ESTABLISH.** Where neither the petition, nor the amendment thereto, contained any averment that the plaintiff performed any carpenter work, or other work, for the defendant, or furnished him any materials, or that there is anything due the plaintiff for such work or materials, there was no foundation for a recovery as for such work and materials, nor for a decree making the amount of such recovery, a specific lien on the property in question.

Roberts v. Campbell.

Appeal from Polk Circuit Court.

SATURDAY, OCTOBER 21.

THIS action was brought to obtain a decree for conveyance by the defendant to the plaintiff of lots 22 and 23 in Pleasant Hill addition to the city of Des Moines, and also a decree for the reasonable rent thereof. The defendant denied the allegations of the petition, and filed a counter-claim in which he averred that there was due him, from the plaintiff, a balance of an account. Afterward the plaintiff filed what he called an amendment to his petition, which, however, contains no averments, but merely an alternative prayer for the establishment of a mechanic's lien upon one of the lots in question, to-wit, lot 22.

The court entered a decree that the defendant convey to the plaintiff lot 23, and also, that the plaintiff recover of the defendant the sum of \$175, and have special execution for that amount against lot 22, and general execution for the balance, if any, after the lot shall be sold. The defendant appeals.

Whiting S. Clark, for appellant.

James Embree, for appellee.

ADAMS, J.—I. The plaintiff avers in substance in his petition that he bought the lots of one Atkins, and took a bond for a deed; that afterwards, and before any deed was executed by Atkins, plaintiff entered into an agreement with the defendant, who was his son-in-law, to board himself and daughter, as long as they should desire to live with him; that to pay for such board, he agreed with defendant that Atkins should deed to the defendant lot 22; that plaintiff had erected and nearly completed a dwelling house on the lot; that the defendant, under the agreement above set out, moved into it and commenced occupying it as a home; that it had become necessary to borrow some money upon the lots to pay Atkins

Roberts v. Campbell.

and to discharge some other liens thereon, and complete the house; that it was arranged between him and the defendant, that Atkins should deed to the defendant, not only lot 22, which he had sold to the defendant, but also lot 23, with the understanding, however, as to lot 23, that that was conveyed to the defendant, only for the purpose of enabling him to raise money thereon, in connection with lot 22, by executing a mortgage upon both to secure a loan; that in pursuance of this arrangement, Atkins, by plaintiff's directions, conveyed both lots to the defendant, the latter agreeing orally that, when he had executed a mortgage on both lots, he would convey lot 23 to the plaintiff at his request. He does not aver that the defendant has executed a mortgage upon the lots, or either of them, but he avers that he had often requested the defendant to convey to him lot 23, and the defendant has refused so to do.

The defendant avers in his answer that he borrowed \$450, on five years time, and secured the same by executing a mortgage on both lots, and used the money in discharging liens upon the lots and in finishing the house.

The court in decreeing that the defendant should convey lot 23 to the plaintiff, recognized the mortgage and decreed that the lot should, as between plaintiff and defendant be subject to the mortgage to the amount of \$151.

Whether the alleged agreement between the plaintiff and defendant for the conveyance of the lot to the plaintiff is not within the statute of frauds we need not determine. No such question is raised. Both the parties testified, and they substantially agree, that the plaintiff was to pay one third of the mortgage debt. It is not claimed by the defendant, as we understand, that the plaintiff is not entitled to have a deed of the lot upon paying the amount which he agreed to pay. Whether he is entitled to a deed before such payment, depends, of course, upon the agreement. All the evidence which we find upon the point is the testimony of the plaintiff, which is in these words: "I was to pay one-third of the \$450, that

Roberts v. Campbell.

is \$150, when I had the vacant lot." This would seem to mean, taken by itself, that he was to pay \$150, whenever the title should be conveyed to him. But this money was not due to the defendant, but to the mortgagee, and it was not due to the mortgagee until the end of five years. Whatever the testimony means, we cannot say that it means that the defendant was bound to convey before the payment. The burden was upon the plaintiff, in order to enable him to maintain an action for a conveyance, to show what the agreement was. In decreeing a conveyance, therefore, before payment, it appears to us, that the court erred.

II. The defendant contends that the court erred in finding that there was anything due the plaintiff for carpenter work and building material, and in decreeing him a mechanic's lien therefor.

Neither the petition, nor amendment thereto, contains any averment that the plaintiff performed any carpenter work or other work for the defendant, or furnished him any materials, nor do they contain any averment that there is anything due the plaintiff for such work or materials. There is, then, no foundation laid in the petition for such recovery, and we think that the court erred in granting it.

III. We come now to inquire whether the defendant is entitled to recover anything upon his counter-claim. The court below found that there would be due him, but for the payments made by the plaintiff, the sum of \$242.29, being considerably less than the amount claimed by him. We see no reason to question the correctness of this finding. As the amount thus found does not exceed the amount of payments admitted by the defendant, there does not appear to be anything due him.

REVERSED.

Green v. Wilding.

GREEN v. WILDING.

1. **Infant: CONTRACT OF: RULE OF LAW.** When the court can pronounce the contract of an infant to be to his prejudice, it is void, and when to his benefit, as for necessaries, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant; but that election must be exercised within a reasonable time after attaining majority.
2. **— : — : DISAFFIRMANCE: REASONABLE TIME.** What is a reasonable time after majority, under section 2238 of the Code, within which an infant may disaffirm a contract made in infancy, depends upon the circumstances of each case. But as the plaintiff in this case did not attempt to disaffirm his conduct except by bringing this action, and did not bring this action until three years and eight months after attaining her majority, and three months after being legally advised that she could disaffirm, *held* that the action was not brought within a reasonable time. The fact that she was informed by persons not qualified to give legal advice that she could not bring her action until her infant brother became of age, was not, in the eye of the law, a sufficient reason for the delay.

Appeal from Pottawatamie District Court.

SATURDAY, OCTOBER 21.

THIS is an action in equity to compel the defendant to reconvey to the plaintiff the undivided one third of a certain eighty acres of land. The court dismissed the plaintiff's petition. The plaintiff appeals. The facts are stated in the opinion.

Ament & Simms, for appellant.

Wright & Baldwin, for appellee.

Day, J.—In 1869, one C. H. Barton died, seized of the land in question, leaving his widow, Rebecca Barton, and his children, Charles B. Barton, and the plaintiff his sole legal heirs. On the 19th day of February, 1872, Rebecca, Ida, and Charles Barton, for the consideration of \$800, conveyed the

Green v. Wilding.

land in controversy, to the defendant. At the time of this conveyance the plaintiff was thirteen or fourteen years of age, and Charles Barton was younger. No order of court was obtained appointing a guardian of the minors, or directing the sale of the real estate in question. The purchase was made by the defendant at the urgent solicitation of Rebecca Barton, and upon her representation that she could not otherwise maintain, educate, and clothe her children. It does not appear but that the price paid was the full value of the land at the time of the purchase. The purchase price was paid to Rebecca Barton. The plaintiff lived with her mother until her marriage in September, 1877. The plaintiff was born in March, 1858, or 1859. This action was commenced on the 14th day of November, 1880, when the plaintiff was either twenty-one years and eight months, or twenty-two years and eight months of age. She assigns as a reason why she did not commence the action sooner, that she was advised by her neighbors, and her mother, that she could not bring the action until her brother, who is still a minor, became of age. It does not appear that she applied for, or received, any legal advice upon the subject. She commenced the action about three months after she was advised by one McCoid, that she could do so.

I. It is insisted that the plaintiff's deed was without consideration, and is therefore void. The consideration was paid to the plaintiff's mother, and it is not shown to have been inadequate. The plaintiff resided with her mother until her marriage, and it does not appear but that she received the full benefit of the consideration in her support and education. The rule respecting the contract of an infant is as follows: "That when the court can pronounce the contract to be to the infant's prejudice, it is void, and when to his benefit, as for necessaries, it is good; and when the contract is of an uncertain nature, as to benefit or prejudice, it is voidable only, at the election of the infant." *Keane v. Baysott*, 2 H. Black, 511; 2 Kent's Com., 193; *Wheaton v. East*, 5 Yerg., 41.

Green v. Wilding.

The case of *Luafford v. Ferguson*, 31 American Reports, 369, S. C., 3 Lea, 292, cited and relied upon by appellant, is one in which there was no consideration whatever for the conveyance of the infant. The conveyance in this case, in our opinion, was not void, but voidable, at the election of the plaintiff within a reasonable time after attaining her majority. See Code, § 2238.

II. The only act of disaffirmance which the plaintiff did in the case was the commencement of this suit, which was either four years and eight months or three years and eight months after she attained her majority. In *Wright v. Germain*, 21 Iowa, 585, it was held that an act of disaffirmance about two years after the plaintiff attained majority was too late, although during the last year of that time he had been in the military service of the United States. In *Jones v. Jones*, 46 Iowa, 466, it was held that an act of disaffirmance about six months after attaining majority was not, under the circumstances, within a reasonable time. What is a reasonable time within the meaning of the statute depends upon the circumstances of each case. *Jenkins v. Jenkins*, 12 Iowa, 195. In this case the only excuse offered for the great delay is that the plaintiff was informed by her mother and neighbors that she could not disaffirm the contract until her brother became of age. She, however, did not take legal advice, and she waited at least three months after she was informed that she could disaffirm the contract, before she commenced the action. In our opinion the plaintiff's act of disaffirmance was not within a reasonable time. The judgment is

AFFIRMED.

Lyon v. Haddock.

59 682
135 403

LYON V. HADDOCK ET AL.

1. **Fraudulent Conveyance: PARENTS TO SON.** A father and mother conveyed to their son, who was living with them, all their real estate, for no other consideration than the assumption by the son of certain liens on the land, but the amount of these liens was considerably less than the value of the land: *held* that the conveyance, so far as the value of the property exceeded the amount of the liens assumed by the grantee, should be held subject to the claims of a creditor whose demands arose prior to the conveyance.

Appeal from Marshall Circuit Court.

SATURDAY, OCTOBER 21.

THIS is an action in equity by which it is sought to subject certain real estate and personal property, the title to which is in the defendant, Thomas J. Haddock, to the payment of certain judgments against the other defendants, upon the alleged ground that the property was conveyed by the other defendants to Thomas J. Haddock in fraud of the rights of plaintiff as a creditor.

There was a decree in the Circuit Court for the plaintiffs, and defendants appeal.

O. L. Binford, and Brown & Carney, for appellants.

Caswell & Meeker, for appellee.

ROTHROCK, J.—The defendant, Thomas J. Haddock, is the son of Thomas Haddock and Mary Haddock, the other defendants. He is unmarried and has his home with his father and mother. At the commencement of this suit he was about thirty years of age. He inherited no property from any source. His parents owned 160 acres of land which was partially improved, and three lots in the city of Marshall. The land was incumbered to the extent of some \$2,000. Within some three or four years after Thomas J. Haddock became of age, his parents conveyed to him eighty acres of the land, and in 1877

Lyon v. Haddock.

they conveyed to him the remainder. He also became the owner of the city lots by a conveyance from his parents to one Weatherby, and by Weatherby to one Crabtree, and from him to Haddock. He assumed the ownership of the farm and of all the personal property thereon and has ever since claimed to own all the property. He paid no money to his parents for the land, and it does not appear that there was any contract that he was to receive pay for his services on the farm after he became twenty-one years of age.

The consideration for the conveyances of the lands was that he assumed to pay off certain mortgages thereon amounting to some two thousand dollars. These mortgages were considerably less in amount than the value of the land. The plaintiff seeks to enforce the payment of two judgments against Thos. and Mary Haddock. One of them was founded on an obligation which was contracted before any of the conveyances were made. The other was contracted after the date of the first conveyance of eighty acres.

The court below decreed that the city lots should be subjected to the payment of the judgments. We think the evidence fairly supports the decree. The conveyances of the lots from Thos. and Mary Haddock to Weatherby, and from him to Crabtree, and from him to Thos. J. Haddock, were all made within a short time. The last conveyance was made at the instance and by the procurement of Thos. Haddock. Thos. and Mary Haddock were insolvent at the time of all of the conveyances, and the consideration agreed to be paid for the land was less than its value. The difference between the mortgages on the land and the value of the land was more than sufficient to pay the plaintiff's claims. We think the circumstances show pretty clearly that the conveyances were made and received, and Thos. J. Haddock was put in the possession and ownership of all the property, to protect it from the creditors of his parents. Even if this be denied, the relationship of the parties was such, coupled with the fact that there was no consideration paid, but a mere assumption of the liens on

Lay v. Templeton.

the land, that the conveyances in so far as the value of the property exceeded the obligations assumed by the grantee would be held subject to the claims of creditors. *Keeder v. Murphy*, 43 Iowa, 413; *Strong v. Lawrence*, 58 Iowa, 55; *Staming v. Laning*, Id., 662.

AFFIRMED.

LAY v. TEMPLETON ET AL.

- 59 684
98 601
59 684
93 113
59 684
116 594
1. **Homestead: CHANGE OF: LIABILITY FOR DEBTS.** A new homestead of no greater value than the old one, though purchased in part with proceeds of the old one, and in part with other means, is exempt from the debts of the owner, contracted subsequently to the occupancy of the old homestead.

Appeal from Greene Circuit Court.

SATURDAY, OCTOBER 21.

This is an action in equity to subject certain town lots, the legal title to which is in the defendant, Sarah A. Templeton, to the payment of a judgment recovered by the plaintiff against the defendant, S. H. Templeton. The court granted the relief prayed as to all the property in controversy, except two lots, which the court held were exempt from execution as the homestead of the defendants. From the dismissal of the petition as to these two lots the plaintiff appeals. The facts are stated in the opinion.

O. H. Balliet and Brown & Carney, for appellant.

L. A. Ellis and Russell & Tolliver, for appellee.

DAY, J.—The judgment to which the plaintiff seeks to subject the property in question was recovered March 9th, 1881, upon an indebtedness contracted August 1st, 1873. In

Ley v. Templeton.

1871, the defendant, S. H. Templeton, owned a house in Nevada, which he and the defendant, Sarah A. Templeton occupied as their homestead. About the first of April, 1875, the defendant sold this homestead in Nevada to Pierce for \$1,525. On the 26th day of April, 1875, S. H. Templeton contracted for the purchase of the lots in question in Scranton for \$325, of which he paid one fourth down, and the balance in one, two and three years.

He immediately commenced the erection of a small house upon these lots, and about the 1st of July, 1875, they moved into the house and have since occupied it as their homestead. For the Nevada homestead Pierce paid \$200 in money, and the balance of the proceeds went to pay debts to Pierce and other parties. This \$200 was applied in part to the payment for the lots, and in part to improving them. The remainder of the proceeds which went into the acquisition of the new homestead arose from the sale of personal property of defendant, S. H. Templeton. S. H. Templeton assigned his interest in the lots to Sarah A. Templeton, and on the 21st day of February, 1880, they were deeded to her. The intention at the time of selling the Nevada homestead was to get another homestead as soon as possible. It is not claimed, and could not be from the testimony, that the Scranton homestead is more valuable than the Nevada homestead. The question involved is whether the new homestead is exempt from liability for the debt in question under the provisions of sections 2000 and 2001, authorizing a change of homestead. We think the Scranton homestead is exempt under the doctrine announced in *Benham v. Chamberlain*, 39 Iowa, 358, which holds that the purchase of a second homestead, with the proceeds in part of the first and other means, entitles the owners to hold it exempt from debts contracted subsequently to the occupancy of the old homestead. See, also, *Sargent v. Chubbuck*, 19 Iowa, 37. The case of *Givans v. Dewey*, 47 Iowa, 414, upon which appellant relies, differs in essential respects from these cases and from the case at bar. In that case the old home-

O'Brien v. Harrison.

stead was disposed of in satisfaction of a debt for which it was liable, and the property sought to be held as a home-stead had no buildings upon it. The judgment of the court below is.

AFFIRMED.

O'BRIEN V. HARRISON ET AL.

59 686
105 409

1. **Judicial Sale: PURCHASE UNDER JUDGMENT SUBSEQUENTLY REVERSED: STATUTE CONSTRUED.** Under section 3199, of the Code, which provides that "property acquired by a purchaser, in good faith, under a judgment subsequently reversed, shall not be affected by such reversal," *held*, that a purchaser who does not pay the full amount of his bid, but only the costs in the case, is not a purchaser in good faith; nor is the grantee of such purchaser, who pays to his grantor only the money paid by such grantor, in any better position than such grantor; nor can one who acted as the attorney of the judgment plaintiff, both in the court below and in the Supreme Court, and who is chargeable with actual knowledge of the appeal, acquire from such grantee of the original purchaser any better title to the land than such grantee himself had.
2. **Practice on Appeal: ORDER TO LOWER COURT TO APPORTION COSTS: FAILURE TO MOVE THE COURT.** Where a judgment including costs is reversed, and the decree of the appellate court directs the court below to make an equitable apportionment of the costs in that court, and reserves to the defendant the right to move at the next term for such apportionment, this decree clearly implies that the original judgment for costs is not left standing, and the neglect of the defendant to move the court for an apportionment of the costs will not have the effect to keep the original judgment for costs against him in force.
3. **Defective Judicial Sale: ABANDONMENT OF LAND BY JUDGMENT DEBTOR: ESTOPPEL.** Where land was sold under a judgment which was reversed on appeal, and the purchaser was not a good faith purchaser, the fact that the judgment debtor, after the sheriff's sale, abandoned the land and removed from it certain buildings, does not estop him to recover possession under his title.
4. **Practice in the Supreme Court: ABSTRACT NOT CONTROVERTED DEEMED TRUE: TRIAL *de novo*.** Where appellant's abstract stated that it contained all the evidence, and appellees, though filing an additional abstract purporting to set forth the evidence, did not, until the argument, claim that the evidence was not all before the court, and that, therefore, the case was not triable *de novo*, *held* that the objection was

O'Brien v. Harrison.

raised too late, and that the court must regard the appellant's abstract, as supplemented by that of the appellees, as containing all the evidence, and that the case must be tried *de novo*.

5. **Defective Judicial Sale: LIEN OF PURCHASER FOR MONEY PAID.** Where land was sold on a judgment which was reversed on appeal, though the judgment debtor was allowed to recover the land of the purchaser's grantee in an action for that purpose, yet it was, *held* that such grantee should have judgment against the owner of the land for the amount paid the sheriff on the sale.

A petition for re-hearing was overruled.

SEEVERS, C. J., unable to concur in the opinion on rehearing, and unable, also, upon reconsideration, to concur in some of the points determined in the original opinion, *dissent*s.

Appeal from Palo Alto District Court.

SATURDAY, OCTOBER 21.

ACTION to quiet the title to certain land. The defendants by a cross bill set up title to the land in defendant, T. W. Harrison, and prayed that his title be quieted. There was a decree dismissing plaintiff's petition and quieting the title in defendant, T. W. Harrison. Plaintiff appeals.

Soper & Crawford, for appellants.

T. W. Harrison, for appellees.

BECK, J.—I. The conflicting titles of the respective parties to the land in controversy have a common source in John O'Brien. The plaintiff claims the land under a deed executed by him. Defendant, T. W. Harrison, claims the land under a sheriff's deed, made pursuant to a sale upon a judgment in favor of John O'Brien against plaintiff in this case, in an action upon a contract between the parties, whereby it was claimed plaintiff became bound to support John O'Brien, his father. Upon this judgment a sheriff's sale and deed were made to James R. White, who conveyed the land to Catherine Murry, and she conveyed it to defendant, T. W. Harrison. We are required to pass upon the validity of the title under

O'Brien v. Harrison.

the sheriff's deed. We find the following facts upon the evidence presented in the record, which are to be considered in the decision of the case:

1. The judgment upon which the land was sold was rendered May, 1876, and execution issued thereon the July following, and in August it was levied upon the land in controversy.

2. Prior to the sale John O'Brien died, having disposed of his property by will. Catherine Murry is a devisee under the will. She is a daughter of the devisor, John O'Brien.

3. Before the sale of the land upon execution, but after the levy, William O'Brien, the defendant in the judgment and the plaintiff in this case, perfected an appeal, but did not supersede the judgment.

4. The land was sold to James A. White, without redemption, and a deed immediately executed, for the reason that an appeal had been taken in the case. White conveyed to Catherine Murry, and she to defendant, T. W. Harrison.

5. By the decree in the action, it was declared that the title of the land in controversy was vested in William O'Brien and judgment was rendered against him for \$895.75 and costs. Upon the appeal, this court decided that John O'Brien, was not entitled to recover a money judgment against William, and that William's title to the land in dispute was valid. See 47, Iowa 392. But in the action, another matter was involved. There was a contract between the parties that John should convey to William certain other lands in consideration of the support of John and his wife. It was held upon the appeal, that, under this contract, neither party was entitled to affirmative relief, further than that the contract, so far as it constituted a cloud upon the title of the land described in it, should be set aside and declared of no effect. A decree, in accord with this opinion was entered in this court. By this decree William recovered the costs of the appeal, but it was ordered that the court below should make an equitable apportionment of the costs of that court in harmony with our

O'Brien v. Harrison.

decision, and the right of William, by motion at the next term of the court below, to demand such apportionment was secured by the decree.

The decision and decree of this court was after the sheriff's sale and deed, and the deed executed by White to Catherine Murry. The deed to Harrison by Murry was executed before that decree.

The foregoing are undisputed facts of the case. Other matters, about which there is conflict of evidence, will be hereafter stated.

II. It appears from the foregoing statement that defendant's title is based upon a sheriff's sale and deed, under a judgment which was subsequently reversed and set aside on appeal to this court. We must now determine whether plaintiff's title is divested by the sale and deed. Code, section 3199, provides that "property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal." The defendant and his grantors under the sheriff's deed must be shown to be good faith purchasers to authorize a decision supporting the validity of that deed.

A claimant of land, who has not paid in full therefor, cannot be regarded as a good faith purchaser. *Kitteridge v. Chapman*, 36 Iowa, 348; *Syllyman v. King*, 36 Iowa, 207.

The evidence clearly shows that White did not pay his bid made at the sheriff's sale for the land. He paid the costs, amounting to \$146.70, and no more. The land was conveyed by White to Catherine Murry, for the consideration of \$1200, but she paid to White only the sum which had been paid by him. Under the rule above stated, these parties are not *bona fide* purchasers.

With Harrison the case is no better. He was the attorney of John O'Brien, both in the Supreme Court and the court below, and is chargeable with knowledge of the appeal and all proceedings had in the case. We reach the conclusion that

O'Brien v. Harrison.

White, Murry, and Harrison cannot be regarded as good faith purchasers under the judgment and execution.

III. Defendants insist that their title is valid, upon the ground that, by the terms of the decree of this court, there remained in the court below a valid judgment for costs, which would support the sale before made. The position is based upon the final decree in this court. After judgment for costs, and an order for execution, the following language is used:

**2. PRACTICE
on appeal:
order to low-
er court to ap-
portion costs:
failure to
move the
court**

"the court below to make such an equitable apportionment of the costs therein as seems proper in view of the findings of this court; and the rights of the defendant, by motion, at the next term of said court, to have such equitable apportionment of costs is hereby reserved." It will be remembered that, preceding this order, the decree sets aside the judgment against defendant and quiets his title to the land in question.

Defendants now insist that the provision of the decree above quoted, and the defendant's failure to move for an equitable apportionment of the costs, leave the judgment for costs standing. But it is very plain that this position is in conflict with the language of the decree under consideration. It expressly provides for, and directs the court below to make, an equitable apportionment of the costs. In this case it clearly implies that the judgment for costs shall not stand, but that a new judgment for costs, after the matter is acted upon, shall be entered. The judgment reversed was an absolute judgment against the defendant for all the costs. Our decree directs that the matter of costs be re-adjudicated by the court below, and of course it implies that, upon such adjudication, a judgment should be entered, to take the place of the one reversed and set aside.

The provision of the decree that the defendant shall be secure in the right to move for an equitable apportionment of costs, does not nullify the preceding provision, nor authorize the conclusion that, if he failed to so move, the judgment shall stand. It simply indicates the method to be pursued by

O'Brien v. Harrison.

the defendant to secure this action by the court below. We conclude that the failure of the defendant to move for an equitable apportionment of the cost did not give validity to the judgment which was set aside, nor in any manner cut off or prejudice his rights.

IV. The plaintiff in this case, the defendant in the former case, it is urged by the defendants herein, after the sheriff's

2. DEFECTIVE sale abandoned the possession of the land in con-
judicial sale: troversy and removed from it certain buildings.
abandonment of land by

judgment debtor: es-
topel. We see no reason why this act should defeat his

title to the land. The abandonment of the occu-
pancy of the lands, without more, would not estop him to re-
cover its possession under his title.

V. Defendants insist that the case cannot be tried *de novo* upon this appeal, for the reason that the abstract fails to set

4. PRACTICE in supreme court: ab-
stract not controverted: trial de novo. out all the evidence. But the abstract expressly

declares that it does contain all the testimony, and defendants filed an amended abstract, and did

not, until the argument, claim that the evidence is not all before us. We must regard the testimony as being fully before us. *Cross v. B. & S. W. R. R. Co. et al.*, 51 Iowa, 683; *Starr v. City of Burlington*, 45 Iowa, 87.

VI. By an amended petition, the plaintiff tendered to defendant the sum of \$208.75, being the amount paid to the sheriff upon the sale of the land, with interest.

5. DEFECTIVE judicial sale: lien of pur-
chaser for money paid. It has been held that the purchaser who pays but a part of the purchase money, and is, therefore, chargeable with notice of outstanding equities, is entitled to a lien upon the land for the sum paid by him. See *Kitteridge v. Chapman, supra*.

In view of this rule and the tenders made by the plaintiff, the defendant is entitled to recover the amount tendered, and will have judgment therefor without costs.

As the conclusions we have announced in the foregoing discussion are decisive of the case, questions involving other points discussed by counsel need not be considered.

REVERSED.

O'Brien v. Harrison.

SUPPLEMENTAL OPINION.

BECK, J.—A petition for rehearing has been filed in this case, which, under the statute, has been supported by an oral argument made by defendant's counsel. We have, upon the petition, re-examined the case, and remain well satisfied with the conclusion and arguments of the foregoing opinion.

A brief reference to two points made in the petition for rehearing is proper, in order to correct a clerical mistake occurring in our opinion, and to make plain the position that the case is triable *de novo* in this court.

I. It is stated in the opinion that the deed to Harrison was executed before the decree was rendered under which the sheriff's sale was had. The deed in fact was after the decree. The mistake is unimportant, as Harrison could not be regarded as a good faith purchaser upon the facts stated, even although he purchased before the decree.

II. Defendants insist that the case is not triable *de novo* by reason of the following facts: Upon the trial in the District Court the plaintiff offered in evidence the printed abstract filed in this court in the case wherein the judgment was rendered upon which the land was sold. The abstract in this case does not set out that abstract, but refers to it as being filed in this court. The defendants, appellees in this case, filed an amended abstract of great length, purporting to set out evidence in the case. It is nowhere stated or claimed therein by defendants that the two abstracts, the original and amended, fail to present all the evidence. The amended abstract contains many records, as executions, returns, etc., besides testimony of witnesses, some of which, it may be presumed, were found in the abstract in the former case.

It is the settled rule of the court that when an amended abstract is filed, in the absence of a claim or allegation therein that it does not with the original abstract present all the evidence, we will presume that all the evidence is before us.

Counsel for defendants cite decisions of the court to the ef-

O'Brien v. Harrison.

fect that, when an abstract shows upon its face that it does not contain all the evidence, we will not try the case *de novo*. But these decisions were made in cases wherein amended abstracts were not filed. They are, therefore, not in conflict with our conclusion upon this point of the case now under consideration.

The presumption that the amended abstract supplied all evidence in the case is sustained by the consideration that our attention has not been called to a single fact relied upon by either party, which is claimed not to be before the court, for the reason that all the evidence is not found in the two abstracts.

It is fair to presume that evidence of all facts thought important by defendants, which was omitted in the original abstracts, is found in the amendment thereto filed by them. Surely, when the defendants presented an amended abstract for the avowed purpose of making the evidence before us complete, it must be presumed, in the absence of anything to the contrary appearing therein, that they presented in their amendment all evidence omitted by the abstract filed by the other side. We are authorized to presume that, when the amended abstract was filed, defendants were content to try the case upon the evidence presented to us.

The only office of an amended abstract is to supply omissions and make corrections of the original abstract. We will presume that all omissions and corrections are made in an amended abstract unless the contrary is therein shown.

The petition for rehearing is overruled.

SHEVERS, CH. J.—I am unable to concur in the foregoing, and, upon reconsideration, I am unable to concur in some of the points determined in the original opinion, and therefore file this dissent.

Manfield v. Sac County.

59 604
106 20
106 504

MANSFIELD v. SAC COUNTY.

1. **Paupers: Employment of Physician for: Board of Supervisors Control Township Trustees.** When the board of supervisors, in a county where there is no poor house, employed a competent physician to attend all the poor of the county, the trustees of the township in which such physician resided might not disregard such employment, and employ other physicians to render such services within their township, and thereby bind the county to pay for the services of such other physicians.

Appeal from Sac District Court.

SATURDAY, OCTOBER 21.

THE plaintiff is a physician, and seeks to recover in this action for his services as such, and for medicines furnished a poor person under the authority of the township trustees. Judgment for the plaintiff, and defendant appeals.

Lot Thomas, for appellant.

Chas. D. Goldsmith, for appellee.

SEEVERS, CH. J.—The trial judge certified there was a question of law upon which it was desirable to have the opinion of the Supreme Court. Such question is as follows: “When the board of supervisors of a county in which there is no poor house, employs a convenient and competent physician to furnish to all the poor persons of the county all medicines and medical aid that such poor persons may require, while such physician is so employed, and ready and able to furnish such medicines and medical aid, may the trustees of the township in which the physician resides disregard such employment made by the board of supervisors, and employ other physicians to furnish medicines and medical aid to the poor persons of said township who make application to them therefor, and bind the county for the payment of medicines and

Mansfield v. Sac County.

medical services rendered or furnished by such physician employed by the trustees?" It is conceded the liability of the defendant must be fixed by the statute or it does not exist. Both parties cite and rely upon the following statute: "The trustees in each township, in counties where there is no poor house, have the oversight and care of all poor persons in their township, and shall see that they receive proper care, until provided for by the board of supervisors." Code § 1364. It is further provided by statute that the poor must make application to the trustees, who may afford such relief at public expense as the necessities of the person may require, and shall report the case to the board of supervisors, who may continue or deny relief as they may see proper. Code, § 1365. Primarily, it may be said, the care of the poor is confided to the trustees. But no provision is made for sudden emergencies, such as a severe accident. The application in such case for relief must be made to the trustees, and the same directed to be furnished by them, before the county can be made liable. If relief is furnished by the trustees, it is regarded as of a temporary character, for the board of supervisors may discontinue the same if they see proper. Now the question is whether the board may, as a matter of precaution and in the interest of economy, employ a convenient and competent physician in advance of a known case of a person needing relief. We think they may. Certainly the statute does not forbid the board from so doing. The trustees have the care and oversight of the poor until relief is afforded by the board of supervisors. This, we think, authorizes the board, in their discretion, to employ a physician to whom the trustees may direct such person for relief. There is no reason why the trustees should not respect the wishes of the board and direct the poor person to apply to the physician employed by the county, unless it may be for some reason not apparent in the record.

Ordinarily the care and responsibility of the trustees will be lessened if they do so, and the poor person in no manner

American Ins. Co. v. Stratton.

prejudiced. If the trustees should employ a physician and report the case to the board, it is clear the latter may discharge such physician and supply another. Why, therefore, may not the board in advance direct the trustees whom to employ.

REVERSED.

59 696
90 732

AMERICAN INS. CO. V. STRATTON.

1. **Promissory Note; OFFICIAL SIGNATURES OF SCHOOL OFFICERS: DISTRICT NOT BOUND BY.** Where a note was given to an insurance company for "Policy No. 138,181," and was signed "E. G., president, J. A., secretary, E. S., director," and had nothing else to show that it was the obligation of the school district of which the makers were the officers, held that, in a suit thereon against one of the makers individually, he could not escape liability by showing that it was given for insurance upon the school-houses of the district, and that it was intended as the obligation of the district.
2. **School Districts; INSURANCE OF SCHOOL-HOUSES: STATUTE CONSTRUED.** Chapter 111, acts of 1882, which legalizes all contracts made by school officers for insurance of school buildings, as well as all orders, warrants and other evidences of indebtedness issued therefor, was not intended to render a district liable for the personal obligation of its officers, such as the note sued on in this case.

Appeal from Cherokee District Court.

SATURDAY, OCTOBER 21.

ACTION upon promissory notes. Judgment for plaintiff. Defendant appeals.

J. D. T. Smith and Joy & Wright, for appellant.

Kellogg & Herrick, for appellee.

BECK, J.—I. The action is upon several promissory notes, all in the following language, except variances as to amounts and numbers of policies:

American Ins. Co. v. Stratton.

"For value received in policy, No. 138,181, dated the day of 18 issued by the American Insurance company, of Chicago, Illinois, we promise to pay to said Company the sum of seven dollars and ninety-nine cents on the 1st day of July, 1874, and seven dollars and ninety-nine cents on the 1st day of July, 1875, and seven dollars and ninety-nine cents on the 1st day of July, 1876, and seven dollars on the 1st day of July, 1877, without interest."

EMORY GOODRICH, *president.*

J. A. CROWTHEE, *secretary.*

ELIAS STRATTON, *director.*

The answer alleges that the notes were given by the officers of a school district, upon a vote of the board of directors, for the premiums upon policies of insurance on the school-houses of the district; that they were received by plaintiffs as the obligation of the district, and the policies were issued thereon and were part of the same transactions, and that defendant was known to plaintiff to be a director of the district. The answer alleges that there was no consideration paid by plaintiff to defendant for the notes, and avers that they are without consideration.

A demurrer to the answer was sustained, and defendant standing upon his pleading, judgment was entered for plaintiff.

II. The case falls within the rule of *Wing v. Glick et al.*, 56 Iowa, 473. The notes in suit do not appear, from anything upon their face, to be the contract of the school district. The description added to the names of the makers of the note is not sufficient to show that it is not their individual contract. Nor does the recitation of the number of the policy have that effect. It is not an unusual thing for an individual to give his note for a consideration moving to another. The fact that the policy was issued to the school district does not establish the liability of the district for the premium, or show that defendant did not intend to bind himself personally for the premiums. The case is distinguishable from *Lacy v. The Dubuque Lumber Company*, 43 Iowa, 510, upon the facts.

American Ins. Co. v. Stratton.

III. The allegation of want of consideration is to be considered in connection with the facts alleged in the answer, which show that the notes were executed for the premiums upon the insurance of the school-houses. Indeed, the language setting up this defense is to the effect that no consideration moved from the plaintiffs to defendant. It does not deny that the premiums constituted the consideration of the notes.

IV. Counsel for defendant insist that under chapter 111, acts Nineteenth General Assembly, the notes are valid obligations against the school district. This statute legalizes all contracts made by school officers for the insurance of school buildings, as well as all warrants, orders, and other evidence of indebtedness issued therefor, but it does not reach this case. It does not provide that personal obligations like the notes in suit shall be regarded as the obligations of the school district, and the obligors shall be relieved from liability thereon; this the statute should attempt to do, in order to be applicable to this case. The question would then arise involving the validity of such a statute.

In our opinion the District Court correctly ruled sustaining the demurrer to the answer to plaintiff's petition, and in rendering judgment for plaintiff.

AFFIRMED.

Marvin v. Marvin.

MARVIN V. MARVIN ET AL.

1. **Divorce: cuts off right to dower.** A woman who has been fully divorced from her husband cannot maintain, against that husband's heirs, an action for one-third of the real estate of which he died seized. Such right belongs only to her who is the wife of the deceased at the time of his death.

Appeal from Polk Circuit Court.

SATURDAY, OCTOBER 21.

It appears from the averments of the petition that the plaintiff was married to Wm. Marvin in the State of Ohio in the year 1852, and in 1856 she obtained a divorce from him in that State on her petition, he being the party in fault. Wm. Marvin died in the year 1880. At the time of the marriage and up to the time of his death he was the owner of 160 acres of land in Polk county in this State. The plaintiff claims that she is entitled to one third of said land in fee as the widow of the deceased. The defendants are the heirs at law of Wm. Marvin. There was a demurrer to the petition which was sustained, and plaintiff appeals.

Detrick & Snell, for appellant.

Smith & Morris, for appellees.

ROTHROCK, J.—A copy of the decree of divorce is attached to the petition, from which it appears that the divorce was full and complete. The following language is found in the decree: "It is therefore adjudged that the marriage contract existing between the parties be, and the same is, hereby canceled, dissolved and held for naught, and the parties be freed from the obligations of the same." The law of this State must control the descent and distribution of property within the State, no matter where the claimants thereto may reside.

Marvin v. Marvin.

The divorce being absolute, the rights of the parties in property within this State must be determined by our laws.

By section 2440 of the Code, the estate of dower is abolished, but one-third in value of all the real estate of the husband is to be set apart to the wife in fee simple if she survive him. It seems to us if there be no surviving wife, as in case of the dissolution of the marriage relation by a decree of divorce, there can be no distributive share set off. It is a prerequisite to the right that there be a surviving wife. After a divorce either party may again marry. Suppose in this case the husband had again married, and died leaving his lawful wife surviving him, who would be entitled to the distributive share of the estate? Of course it would be the last wife. There cannot be two surviving wives. At common law "no woman can have dower in her husband's lands unless the coverture were continuing at the time of his death." An absolute divorce "puts an end to all rights resting upon the marriage and not actually vested." Bishop on Marriage and Divorce, § 661.

There is no provision of our statute which changes this rule of the common law. On the contrary, by section 2229 of the Code, "where a divorce is decreed, the court may make such order in relation to the children, property, parties and the maintenance of the parties, as shall be right and proper." We think it is the common practice in divorce proceedings in this State to make an equitable division of the property of the parties to the action. Such a proceeding is in harmony with the thought that the rights of the parties in the property of each other are then fixed for all time, unless the decree be modified subsequently because of the changed circumstances of the parties.

We do not think it necessary to further elaborate the case. It appears to us that under our laws it is absolutely essential for plaintiff to show that she was decedent's wife at the time of his death and is his surviving widow. This cannot be shown, because the marriage was dissolved by the decree of divorce.

AFFIRMED.

Snell v. Iowa Homestead Co.

59 701
133 543

SNELL v. IOWA HOMESTEAD CO.

1. **Vendor and Vendee; Covenants of Warranty: Liability of Vendor: Measure of Damages.** In this case the defendant conveyed to one S., with the usual covenants of warranty, certain land to which it had no title. S. afterwards mortgaged the land to the plaintiff to secure the payment of certain notes, the mortgage containing the following recital: "The intention being hereby to convey an absolute title in fee simple." S. afterwards conveyed the land to J. C., subject to the mortgage to plaintiff, and J. C. afterwards conveyed to M. C., who perfected her title by securing a conveyance from the real owner, the amount paid by her therefor not appearing. Plaintiff herein sues the defendant upon the breach of its covenants of warranty, to recover the amount due on his mortgage notes, but the court held that neither S. (the original grantee), nor any one holding under her, could buy in the paramount title, and recover of the defendant more than the amount paid therefor, with interest; and that she could not, by her mortgage to plaintiff, have conveyed to him any greater rights against defendant than she herself possessed; and since it does not appear how much M. C. paid for the paramount title, plaintiff is entitled upon the record to only nominal damages.

Appeal from Buena Vista Circuit Court.

SATURDAY, OCTOBER 21.

This is an action for the breach of covenants in a deed of conveyance of real estate. The cause was tried to the court, and judgment was entered for the plaintiff for \$1,007.72. The defendant appeals. The facts are stated in the opinion.

Hubbard, Clark & Dawley, for appellant.

Detrick & Snell, for appellee.

DAY, J.—The cause was submitted to the court below upon an agreed statement, showing the following facts: On the 28th day of November, 1864, the Iowa Homestead Company, in consideration of \$501.38, conveyed the property in controversy to one Mary Stine. On the 21st day of May, 1866, Mary Stine executed a mortgage upon said property to

Snell v. Iowa Homestead Co.

Thomas Snell to secure the payment of two promissory notes, one for \$125.25, and the other for \$328.59, the mortgage containing the following recital: "The intention being to convey hereby an absolute title in fee simple." On the 5th day of November, 1866, Mary Stine, in consideration of \$3,000, conveyed said land to Jacob Crouse, subject to the mortgage to Thomas Snell. Afterward the property was conveyed to Mary Crouse. The land in controversy is included in the lands granted to the State of Iowa, and by the State to the Des Moines Navigation and Railroad Co. The only claim of title the Iowa Homestead Company had to said land at the date of its conveyance to Mary Stine, or at any time thereafter, is under a conveyance from the Dubuque and Pacific Railroad Company. The Supreme Court of the United States, in case of *Homestead Co. v. Valley Railroad Company*, 17 Wall., 161, and other cases upon the same state of facts affecting the title as in this case, decided that the Dubuque and Pacific R. R. Co. had nothing at all in said land, and that the same passed to the Des Moines Navigation and Railroad Co. under the grants by Congress to the State of Iowa, and the conveyance from said State to said company. Mary Stine at the date of the deed from the Homestead Company to her for said land, took possession thereof, and she and her grantees remained in possession thereof under said conveyance until July 7th, 1875, when Mary Crouse, the last grantee under the conveyance from said Homestead Company, purchased the title thereto through a conveyance from said Des Moines Navigation and Railroad Co. The agreed statement does not show what Mary Crouse paid for the conveyance to perfect her title. The court found for the plaintiff the amount of the note for \$328.59, with interest compounded at eight per cent, the plaintiff having waived all claim to recover on the other note. The appellant insists that, as the conveyance from Mary Stine and Jacob Crouse was in terms subject to the prior mortgage to Thomas Snell, the subsequent perfecting of the title by Mary Crouse

Snell v. Iowa Homestead Co.

enured to the benefit of Thomas Snell; that his title was then perfected, and there has been no breach in the covenants as to him.

In the view which we take of the case we do not deem it necessary to determine this question. The conveyance of the Iowa Homestead Co. to Mary Stine subjected the company to certain liabilities, and conferred upon it certain privileges. The grantee of the Homestead Co. took possession of the land under the conveyance. If she and those holding under her had remained in adverse possession under this conveyance for ten years, their title, defective at first, would have ripened into a perfect title, and there would have been no liability upon the part of the defendant on the covenants in its deed. If, however, the grantee of the defendant, or any one holding under her, had been evicted under a paramount title, the defendant would have been liable upon its covenants to the extent of the consideration received, and interest. The defendant, however, had a right at any time before eviction to buy in the outstanding title, and thus perfect the title of its grantee, and escape liability upon its covenants. The grantee of the defendant, however, was not bound to wait until actual eviction, but she also might buy in the outstanding title, thus suffering a constructive eviction, and recover of the defendant, her grantor, the amount paid for the outstanding title, if such amount was reasonable. Now, if no mortgage had been executed, neither Mary Stine nor any one holding title under her could buy in the outstanding title and recover more than was paid for it with interest.

It seems to us evident that Mary Stine could not convey to her grantees a greater right than she herself possessed. She could not, by executing a mortgage to one party, and a conveyance of the equity of redemption to another, deprive her grantor of the right which he possessed to protect himself by buying in the outstanding title, nor render him liable for more than was paid by any one holding under him for such title. It does not appear what Mary Crouse paid

American Missionary Association v. Smith.

for the outstanding title. There is, therefore; in the case, no basis for the recovery of more than nominal damages. See *Brandt v. Foster*, 5 Iowa, 287; *Baker v. Corbett*, 28 Id., 317; *Thomas v. Stickle*, 32 Id., 71; *Richards v. Iowa Homestead Co.*, 44 Id., 304. In rendering judgment for the amount of the note secured by the mortgage and interest, the court erred.

REVERSED.

59	704
91	359
59	704
93	134
59	704
105	475
59	704
112	331

AMERICAN MISSIONARY ASSOCIATION v. SMITH.

1. **Tax Sale: Service of Notice to Redeem: Statute Construed.** The affidavit required by section 894 of the Code, to perfect the service of the notice therein prescribed of the expiration of the time for the redemption of land sold for taxes, must be signed and verified by the holder of the certificate of purchase, his agent or attorney. An affidavit made by one of the proprietors of the paper in which the notice was published, held insufficient to cut off the right of redemption.

Appeal from Polk Circuit Court.

SATURDAY, OCTOBER 21.

THIS is an action in equity to quiet title to certain land. The defendant claims the land under a tax deed. The plaintiff claims that the land was not subject to taxation for the year for which it was sold, and that no sufficient notice was given of the expiration of the time of redemption, and no sufficient affidavit was made of the service of the notice. The court found that the defendant failed to serve the proper notice prescribed by law, prior to the taking of the deed, and that the land is still subject to redemption. The court adjudged that the plaintiff may redeem said land from the sale by paying for the use of defendant the sum of \$45.34, which sum the plaintiff thereupon paid into court for the use of defendant. The defendant appeals. The material facts are stated in the opinion.

American Missionary Association v. Smith.

Crom. Bowen, for appellant.

Sickmon & Barclay, for appellee.

DAY, J.—The cause was submitted to the court below upon an agreed statement of facts. In the view which we take of the case, we deem it necessary to set forth only the facts pertaining to the notice of the expiration of the period of redemption, and the affidavit required in section 894 of the Code.

The land was assessed for the years 1873 and 1874 to Edgar Ketchum, treasurer American Missionary Association. For 1875 and 1876 the land was assessed to Edward Ketchum, treasurer American Missionary Association. For the years 1877 and 1878 the land was assessed to Edward Ketchum, president American Misssionary Association. The defendant claims the land under a sale for the taxes of 1874. The notice and affidavit ran as follows:

To Edgar Ketchum and others: “You are hereby notified that on the 21st day of October, 1875, the following property was sold for the taxes for the year 1874. * * * That the same was purchased by E. W. Smith, and duly assigned to Scott E. Smith, and that the right of redemption will expire, and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service hereof. Dated at Des Moines, this 30th day of August, 1878.

SCOTT E. SMITH,
Owner of Certificate.”

John G. Blair, being sworn, says: “That he is one of the proprietors of the *Iowa State Journal*, a newspaper published in Des Moines, Polk county, Iowa, and that the notice of which the annexed is a printed copy was published in said *State Journal* three consecutive weeks, the first publication being upon the 12th day of September, A. D. 1878, and the last on the 26th day of September, 1878. JOHN G. BLAIR.”

Section 894 of the Code provides as follows: “After the

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expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land or town lot, and also upon the person in whose name the same is taxed, a notice, signed by him, his agent or attorney, stating the date of sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire, and a deed for said land be made, unless redemption from such sale be made within ninety days from the completed service thereof. * * * *

* * Service shall be deemed completed when an affidavit of the service of said notice, and of the particular mode thereof, duly signed and verified by the holder of the certificate of purchase, his agent or attorney, shall have been filed with the treasurer authorized to execute the tax deed." This statute clearly fixes the time when the proper affidavit of the holder of the certificate of purchase, his agent or attorney is filed, as the commencement of the period of ninety days within which redemption must be made.

The statute requires the affidavit to be signed and verified by the holder of the certificate, his agent or attorney. The provision is statutory, and it is imperative. Until the statute is complied with, the statutory period of redemption cannot expire. Doubtless the affidavit of some other person, cognizant of these facts, would be just as efficacious in imparting information to the treasurer of the time when, and manner in which, notice was given. But no other person is authorized to make the affidavit. We are not authorized to say that the affidavit of some other person may be substituted because it would be as efficacious, nor are we called upon to assign any reason why the authority to make the affidavit should be limited to the owner, his agent or attorney.

When the provisions of the statute are plain and unambiguous, it is sufficient to say *ita lex scripta est.* The affidavit in this case was made by one of the proprietors of the paper in which the notice was published, and not by the owner of the

Miller v. C. & N. W. R. R. Co.

certificate, his agent or attorney. It was therefore insufficient under the statute, and the plaintiff is still entitled to redeem from the tax sale. The judgment of the court below is

AFFIRMED.

59	707
80	667
106	244

MILLER v. C. & N. W. R. Co.

1. **Railroads: RATE OF SPEED: VERDICT: EVIDENCE TO SUPPORT.** Since it appears from the evidence in this case the accident to plaintiff's horse, for which he seeks to recover, may have been occasioned by defendant's train entering upon the depot grounds at the unlawful rate of more than eight miles per hour, notwithstanding the fact that the train had slowed down to a speed of less than eight miles per hour before the animal came upon the track, and the evidence is thus susceptible of a construction consistent with the verdict, the verdict will not be set aside as not being supported by the evidence.
2. ——: INJURY TO STOCK RUNNING AT LARGE: CONTRIBUTORY NEGLIGENCE. An instruction in the following language: "If the plaintiff knowingly allowed his horse to be upon and to frequent the depot and station grounds of defendant, where it was not required to fence, and where there was danger of the horse being struck by the trains of defendant, he is guilty of contributory negligence, and cannot recover in this action," held, properly refused. *Kuhn v. C. R. I. & P. R. Co.*, 42 Iowa, 420.
3. ——: INJURY TO STOCK ON DEPOT GROUNDS: DOUBLE DAMAGES: STATUTE CONSTRUED. A statute ought not to be so construed as to create or authorize the recovery of a penalty, unless the intention to do so is clear. Consequently, the latter part of § 1289 of the Code, making railroads liable under said section for the operating of trains in depot grounds at a greater rate of speed than eight miles per hour, being susceptible of a different construction, will not be construed so as to authorize the recovery of double damages for injuries to stock caused by a violation of said statute.

SATURDAY, OCTOBER 21.

Appeal from Story Circuit Court.

THIS is an action to recover double damages for the killing of plaintiff's horse, upon defendant's depot grounds, by a train

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running, it is alleged, at a greater rate of speed than eight miles an hour. Upon motion of the defendant, all that portion of the petition relating to double damages was stricken out.

The defendant denied the allegations of the petition, and alleged that the plaintiff contributed to the injury by allowing his horse to run at large in the vicinity of the depot grounds. There was a jury trial resulting in a verdict and judgment for the plaintiff for one hundred dollars. Both parties appeal. The defendant, having first served notice of appeal, is to be denominated the appellant.

Hubbard, Clark & Dawley, for appellant.

Geo. A. Underwood and S. F. Balliett, for appellee.

DAY, J.—I. It is insisted by the defendant that the verdict is not supported by the evidence. Section 1289 of the Code 1. RAILROADS: provides: “The operating of trains upon depot rate of speed: verdict: evi- grounds necessarily used by the company and pub- dence. public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section.” There was evidence tending to show, and from which the jury could have found, that the train in question, when it passed the east switch and entered upon the depot grounds, was running at a rate of from fifteen to sixteen miles an hour, and that the whistle for stock was made soon after the engine crossed the switch. Before the animal actually came upon the track, which was about five or six rods ahead of the engine, it appears without conflict in the evidence that the train had slowed down to a speed less than eight miles an hour, and that, when the engine struck the horse in question, the train had so nearly stopped that the fireman got off the engine and went ahead of it, and drove another animal off the track. From the fact that the stock whistle was sounded soon after the train passed the east switch, the jury were authorized to

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find that the animal in question was then discovered to be in a dangerous situation.

And from the fact that the train had so nearly stopped when the accident occurred, the jury were authorized to find that the train would have been stopped entirely, if it had entered the depot grounds at a speed not exceeding eight miles an hour.

It follows that the accident may have been occasioned by the train's entering upon the depot grounds at a speed greater than eight miles an hour, notwithstanding the fact that the train had slowed down to a speed less than eight miles an hour before the animal actually came upon the track. We do not feel authorized to disturb the verdict upon the ground that it is not supported by the evidence.

II. The evidence shows that the plaintiff lived about one hundred yards from the depot, and that the night before the ~~2. —injury~~ ^{to stock run-} ~~running at large:~~ ^{contributory} injury he turned his horses out to graze north of the depot, and that they were in the habit of running at large and grazing upon the depot grounds.

The defendant asked the court to instruct the jury as follows: "If the plaintiff knowingly allowed his horse to be upon and to frequent the depot and station grounds of defendant, where it was not required to fence, and where there was danger of the horse being struck by the trains of defendant, he is guilty of contributory negligence and cannot recover under this action." The refusal to give this instruction is assigned as error.

This instruction was properly refused under the doctrine announced in *Kuhn v. C. R. I. & P. R. Co.*, 42 Iowa, 420. The case of *Van Horn v. B., C. R. & N. R. Co.*, 33 ante, is not in point. In that case it was held that the defendant should have been allowed to prove that the stock killed ran at large unlawfully, in violation of a city ordinance.

III. It is claimed that the verdict is contrary to the instructions of the court, that the plaintiff must show that the injury occurred without fault or negligence on his part and

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that, right or wrong, this instruction embraces the law of the case and must be followed. But the court further instructed the jury that it was not necessarily negligence for the plaintiff to suffer his horse to run at large, and left it to them to determine as a question of fact, whether the plaintiff exercised such ordinary and reasonable care to prevent injury as an ordinarily prudent person would exercise under like circumstances. The instructions clearly left it to the jury to determine whether, under the circumstances, it was negligence for the plaintiff to allow his horse to run at large. It cannot be claimed that the jury, in rendering a verdict for the plaintiff, disregarded these instructions.

IV. The plaintiff's appeal presents the question as to his right to recover double damages. Section 1289 of the Code 3. — : inju- is as follows: "Any corporation operating a rail-
ry to stock way, that fails to fence the same against live stock
on depot grounds: measure of running at large at all points where such right to
damages: statute con- fence exists, shall be liable to the owner of any
such stock injured or killed by reason of the want of such
fence for the value of the property or damage caused, unless
the same was occasioned by the willful act of the owner or his
agent. And in order to recover, it shall only be necessary for
the owner to prove the injury or destruction of his property;
and if such corporation neglects to pay the value or damage
done to any such stock within thirty days after notice in
writing, accompanied by an affidavit of such injury or destruc-
tion, has been served on any officer, station or ticket agent
employed in the management of the business of the corpora-
tion, in the county where the injury complained of was com-
mitted, such owner shall be entitled to recover double the
value of the stock killed or damages caused thereto. * * *
* *. The operating of trains upon depot grounds necessa-
rily used by the company and public where no such fence is
built, at a greater rate of speed than eight miles per hour,
shall be deemed negligence and render the company liable
under this section." The body of this section was enacted in

Miller v. C. & N. W. R. R. Co.

1862. The provision respecting the operating of trains upon the depot grounds was added in 1873, when the Code of 1873 was adopted. This provision is susceptible of two constructions. First: That it creates a liability to the same extent as for a failure to fence, including a liability for double the damages caused, upon a failure to pay for the injury within thirty days after the giving of the prescribed notice. Second: That it simply makes the running at a greater rate of speed than eight miles an hour negligence and creates a liability therefor, leaving the extent of the liability to be determined by the amount of injury done. The provision in this section making the defendant liable for double the damages is in its nature penal. A statute ought not to be so construed as to create or authorize the recovery of a penalty, unless the intention to do so is clear. Inasmuch as this provision of the statute is susceptible of different constructions, it ought not, we think, to be so construed as to authorize the recovery of double damages. Upon both appeals the judgment is

AFFIRMED.

Crosby v. Hungerford.

[The two opinions next following, which were filed at the June term, 1882, were held for rehearing, and did not come into my hands in time for publication in their proper order. **REPORTER.**]

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CROSBY V. HUNGERFORD ET AL.

1. **Pleading: REDUNDANT ALLEGATIONS: PROOF OF NOT NECESSARY.** In an action against the sureties on a sheriff's bond for negligence of the sheriff in failing to levy an execution upon certain property in the possession of the execution debtor, *held* that it was sufficient for the defendants, having admitted that the execution debtor had in his possession certain articles of personal property, to deny that he was the owner of them; and although defendants proceeded to aver with particularity the ownership of each article of such personal property, such averments were redundant, and it was not incumbent upon defendants to prove the same.
2. **Execution: DUTY OF SHERIFF TO LEVY: INSTRUCTION.** In such action the court gave the following instruction: "Under said execution the sheriff was bound to levy on the property in possession of the execution debtor, but if he failed to levy thereon, and if the evidence shows that the property was then the property of some one other than the execution debtor, then the defendants herein are not liable for the failure, if any, of said sheriff to levy on said property;"—*held* correct and properly given.
3. ——: ——: **MEASURE OF SKILL AND DILIGENCE REQUIRED.** The exercise of such skill and diligence as a reasonable man would exercise in the performance of like duties under the same circumstances, is all that can be required of a sheriff in levying upon property under an execution.
4. **Instructions: REPETITION NOT REQUIRED.** It was not error to refuse to give to the jury an instruction asked by a party, when the instruction refused was substantially covered by one given.
5. **Evidence: IMPROPER ADMISSION OF: ERROR WITHOUT PREJUDICE.** Where a fact was established by testimony which is not disputed, the appellant cannot claim to have been prejudiced by the admission of other immaterial testimony tending to establish the same fact.
6. **Practice: INTERROGATORIES TO JURY: DUTY OF PARTY PROPOSING.** The statute is imperative that a party proposing to submit to the jury special interrogatories shall submit the same to the attorney of the adverse party *before the argument is begun.* It is not sufficient that they be submitted to the court; and the court did not err in refusing to submit to the jury interrogatories which had not been submitted to the adverse attorney within the time provided by statute.

Groby v. Hungerford.

7. **Verdict: evidence to support.** Where there is some evidence to support a verdict, it will not be set aside in this court as being without support.

Appeal from Sioux District Court.

FRIDAY, JUNE 9.

ACTION upon a sheriff's bond. The defendants are sureties upon the bond. The principal, one Innis, is dead. The plaintiff obtained a judgment against one Van Sickle and caused execution to be issued and placed in the hands of Innis, who was sheriff of Plymouth county. No levy was made by Innis, and the plaintiff avers that he was guilty of negligence in not making a levy. The defendants deny that he was guilty of negligence. There was a trial to the jury and verdict and judgment rendered for the defendants. The plaintiff appeals.

H. C. Hemmoay and H. C. Curtis, for appellant.

G. W. Argo and Isaac Pendleton, for appellee.

ADAMS, J.—I. The defendants in their answer admitted that Van Sickle, the execution debtor, had certain personal

1. **PLEADING:** redundant allegations: proof of not necessary. property in his possession but averred that he did not own the same. They described the property, showing it to consist of agricultural implements, and they set out the name of the owner of each implement. The court instructed the jury that, if the evidence showed that the property belonged to some one other than Van Sickle, the defendants were not liable for Innis' omission to levy on the same. The plaintiff contends that the court misconceived and misstated the issue, for that under the averments of the answer it was incumbent upon the defendants to prove that the several implements belonged to the several persons respectively named in the answer as the owners thereof, and that it was not sufficient for the defendants to prove that they belonged to some one other than Van Sickle.

The answer to our mind contained more than is necessary.

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The plaintiff had averred, as it was incumbent upon him to do, that there was property liable to the execution. He had also averred that Innis was guilty of negligence in omitting to levy. Under the issue thus tendered, it was sufficient for the defendants to deny that there was property liable to the execution, or, if they were satisfied that there was such property, they might simply deny that Innis was guilty of negligence. This they did do and in addition averred with particularity the ownership respectively of the different articles of property in Van Sickle's possession. Now whatever view the court may at one time have taken of the necessity of such averment, we have to say that we think it was not necessary, and that the court did not err in omitting to instruct the jury that the ownership must be proved strictly as averred. If Van Sickle did not own the property it was not important to inquire who did.

We ought perhaps to say in this connection that the plaintiff seems to have conceived the idea that an admission of possession of personal property by Van Sickle was an admission of the defendant's liability, unless avoided by an averment that the property was owned by some person other than Van Sickle. But possession by Van Sickle was merely presumptive evidence that he was the owner. This presumption might be overcome by evidence that he was not the owner, and such evidence was admissible under the denial that there was property liable to the execution.

II. The court gave an instruction in these words: "Under said execution the sheriff, Innis, was bound to levy on the property in the possession of Van Sickle, but if ^{2. EXECUTION: duty of sheriff to levy: in-} he failed to levy thereon, and if the evidence shows ^{struction.} that the property was then the property of some one other than Van Sickle, then the defendants herein are not liable for the failure, if any, of said Innis to levy on said property." The giving of this instruction is assigned as error.

The plaintiff's contention is, if we understand it, that the

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sheriff, having violated an imperative obligation to levy on the property in Van Sickle's possession, became liable to the amount of the full value thereof, not exceeding the amount of the execution, and that it is not material whether Van Sickle had any interest in the property or not.

It was held in *Evans & Son v. Thurston*, 53 Iowa, 122, that where an officer has levied an execution, and has been indemnified, it is his duty to hold the property, and subject it to his execution, and that if he releases it he cannot be allowed to escape liability by showing that the property did not belong to the execution debtor. But the reasoning in that case will show that it is not applicable to the case at bar. It is abundantly evident that, if Van Sickle had no interest in the property in question, the plaintiff sustained no injury by the sheriff's failure to levy, and we think it allowable for the defendants to show that Van Sickle had no interest. *Governor v. Campbell*, 17 Ala., 566.

III. The court instructed the jury that if the sheriff used ordinary skill and diligence in the discharge of his duties ^{a. — : — : the defendants would not be liable.} the giving ^{measure of} _{skill and dilig-} of this instruction is assigned as error. It is _{gence required.} contended that the sheriff was bound to use more than ordinary skill and diligence. But we cannot say that he was, if we take the words used in the sense in which they appear to have been used. The court defined ordinary skill and diligence as being such as a reasonable man would exercise in the performance of like duties under the same circumstances. Reasonable diligence we think is sufficient. *Elmore v. Hill*, 51 Wis., 365; *Barnes v. Thompson*, 2 Swan, (Tenn.), 312.

IV. The plaintiff requested the court to instruct the jury that any statement to the sheriff by Van Sickle that the property in his possession was not his, would not relieve the sheriff from his obligation to levy. The court refused to so instruct and the refusal is assigned

¹ INSTRUCC-
TION: repeti-
tion not re-
quired.

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as error. The court had already given an unqualified instruction to the effect that the sheriff was bound to levy upon any property in Van Sickle's possession. This was equivalent to saying that there was nothing shown in the case which could relieve him from the obligation. The instruction refused was we think substantially covered by the one given.

V. The plaintiff assigns as error the admission in evidence of a contract executed by him to the Adams & French Har-

5. EVIDENCE: Improper admission of: error without prejudice. vester Co. The contract purported to show that they made Van Sickle their agent for the sale of harvesters. It also showed the terms of the agency.

Van Sickle testified that a certain harvester in his possession was received by him from the Adams & French Harvester Co. as their agent. He says that he received it under a contract executed in 1875, the terms of which were similar to the terms of the contract introduced in evidence, which was executed in 1876. The plaintiff insists that the contract was immaterial and secondary evidence. If we should concede that the contract was inadmissible, we should not be able to say that the plaintiff was prejudiced. The testimony of Van Sickle that he received the harvester as agent seems to be undisputed.

VI. The plaintiff complains that certain interrogatories proposed by him for submission to the jury the court refused

6. PRACTICE: Interrogatories to jury: duty of party proposing. to submit. The defendants objected to the submission on the ground that they were not pertinent, and would tend to confuse the jury, and upon the further ground that they were not submitted to the defendant's attorneys until after the argument had commenced. The statute is imperative that such questions must be submitted to the attorneys of the adverse party before the argument is commenced. It is contended that it is sufficient that they were submitted to the court, because it must be presumed that the court submitted them to the attorneys of the adverse party, but we think otherwise.

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VII. The plaintiff contends that the verdict is without support, because there was no evidence that Van Sickle was ^{7. VERDICT:} not the owner of the personal property in his possession. The evidence upon this point is not very full, but Van Sickle testifies in these words: "None of this property which was received according to the written contracts I have produced belonged to me, and I had no property liable to be taken on execution." We think that the verdict could not be said to be without support. The judgment must be

AFFIRMED.

ROBISON v. FIRST M. E. CHURCH OF FRANKVILLE ET AL.

1. **Fraudulent Conveyance: PREFERENCE OF CREDITORS: RULE IN EQUITY.** The defendant, the M. E. Church, owned the lot in question, on which was situated its house of worship and parsonage. It was indebted to Litchfield, \$122.18, to Lane, \$355, and to Aldrich, \$300. Litchfield had begun an action to recover his claim, but three days before he obtained judgment, the church conveyed to Aldrich in payment of his claim, that part of the lot on which the parsonage stands, and mortgaged to Lane the other part to secure her claim. Plaintiff claims the property by virtue of a sheriff's deed obtained under the Litchfield judgment, and seeks to set aside the deed to Aldrich, and the mortgage to Lane as fraudulent. Under these facts the court held that plaintiff could not recover, because:

First: The church in preferring creditors, did not exhaust its property, it appearing that the portion mortgaged to Lane for \$355 was worth at least \$3,000.

Second: The plaintiff does not come into court with clean hands, since he seeks to hold property worth \$3,500 on a sheriff's deed which cost him only \$171.66, and tries to defeat two other creditors holding equally just claims, one for \$355, and the other for \$300.

Appeal from Winneshiek Circuit Court.

THURSDAY, JUNE 15.

ACTION in chancery to set aside and declare void a certain deed, and a mortgage executed by the First Methodist Espis-

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copal Church of Frankville, on the ground that they were made with the fraudulent purpose of hindering and delaying its creditors. Upon a trial on the merits plaintiff's petition was dismissed; he now appeals to this court. The facts of the case are fully stated in the opinion of the court.

Cooley, Fannon & Akers, for appellant.

L. Bullis, for appellee.

BECK, J.—I. The petition alleges among other matters that plaintiff acquired title to lot 22, in the town of Frankville, under a sheriff's sale and deed made pursuant to a judgment against the First Methodist Episcopal Church of Frankville; that just prior to the sale, the church fraudulently, for the purpose of delaying and hindering its creditors, conveyed a part of the lot to Smith Aldrich and executed a mortgage upon the other part to Eveline Lane, to secure \$335, and that these conveyances were voluntary and without consideration. It is alleged that Aldrich, conveyed the property deeded to him by the church to Germund Merrill, who had notice of plaintiff's title and took the conveyance without consideration for the purpose of defrauding plaintiff. The petition prays that plaintiff's title be established against the deed and mortgage referred to, and that they be declared void and of no effect. The church, Aldrich, Lane, and Merrill, are made defendants. They answer the petition denying all fraud, and alleging that the conveyances assailed in plaintiff's petition were made in good faith and upon sufficient consideration, and are valid and lawful instruments, and they ask that, by proper decree in this case, it may be so declared, and that they have such other relief as they may be entitled to under the rules of equity. Other allegations of the pleadings need not be here recited.

II. Upon the evidence and admissions of the pleadings, we find the facts of this singular case to be as follows:

1. The First M. E. Church of Frankville, prior to the

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transactions involved in this suit, owned the lot in controversy, whereon it had erected a house of worship costing from \$6,000 to \$7,000, and a parsonage at a cost of \$400 or \$500. When the church edifice was about to be "dedicated," it was found that an unsatisfied mortgage was upon it, amounting to about \$1,400, held by one Teabout. It was thought desirable to remove this incumbrance before "dedication," so that the property would be "free." Teabout accordingly proposed that he would contribute one-half of the amount of his claim if the balance would be provided for. Thereupon four trustees of the church executed their notes to Teabout for equal portions of the half of the debt, and he canceled his mortgage. Two of the trustees executing the notes were Litchfield and Lane. Teabout understood that in this transaction the trustees made to the church a contribution of the amounts of their respective notes, and that the church was to be released from debt. But it appears that there was some arrangement or understanding that the contribution was made by these trustees depending upon the liberality and generosity of the membership of the church to reimburse the amount they should severally pay.

2. Litchfield afterwards claimed payment from the church, and a settlement or compromise of his claim was made, and the promissory note of the church, by its trustees, was made to him for \$133. Upon this note Litchfield afterwards recovered a judgment for \$122.18 and \$14.45 costs, upon which lot 22, whereon the house of worship and parsonage were situated, was sold to Litchfield for \$153.92, being, as we understand it, the amount due upon the execution. In due time a sheriff's deed was executed to Litchfield, who by quit claim deed conveyed the property to plaintiff, Robinson, for the consideration of \$171.66.

3. Three days before the judgment was rendered in favor of Litchfield the church by its trustees conveyed that part of the lot upon which the parsonage was situated to Aldrich for

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the consideration of \$300. Aldrich was the pastor of the church and a balance of his salary was due. He paid a small claim against the church for lumber. The parsonage was conveyed to him in payment of the amounts due upon these claims, which we find are just and true.

4. On the same day the deed to Aldrich was made, the church executed a mortgage to Mrs. Lane. Her husband was one of the trustees of the church executing the notes to Teabout, and subsequently died. It is shown that she succeeds to all his rights and property. It appears that when Litchfield demanded payment of the church, Mrs. Lane insisted that she should also be paid, and the trustees executed the mortgage to secure her.

5. It is shown that the church edifice cost from \$6,000 to \$7,000, and we find that it is worth at least \$3,000. The plaintiff is the pastor of the Presbyterian Church at Frankville, and the evidence shows that he intends the property in controversy for the use of his own church. It is shown that he estimates it to be of the value of \$3,000, and that he stated he should report it to the "Presbyterian Church Board of Extension" as of that value, and from this "board" he expected to receive a part of the sum the property cost him. His statements to this effect are proved, and he does not in his testimony deny having made them. We think the testimony shows that all of the lot in controversy, including both the house of worship and the parsonage, is worth at least \$3,500.

6. The defendants, as well as the trustees of the church executing the deed and mortgage to Aldrich and Lane, testify that it was not the purpose of the transactions to defeat or delay Litchfield in the collection of his claim, but the conveyances were made in good faith to pay and secure the claims of the grantees.

III. We are quite clear in our own opinion, however, that the trustees were quite anxious that Aldrich and Lane should have preference to Litchfield. But this is not a fraud as to

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Litchfield, and the law will not on that ground alone disturb the conveyances. A debtor may prefer by payment or security a creditor. This is a familiar rule of the law, and in exercising this preference, if he retains enough property to satisfy other creditors, they have no ground of complaint in law, equity or conscience. The church by its deed to Aldrich paid his just claim. It retained property to the value of \$3,000 at least, which cost \$6,000 or \$7,000. Upon this property it executed a mortgage to secure to Mrs. Lane \$355. It owed Litchfield \$122.18, which was subsequently increased by costs to \$153.92. It owed no other debts. Now surely a mortgage by way of preference upon property worth \$3,000 to secure \$335 cannot be regarded as fraudulent as against a solitary creditor holding a claim of \$122.15. But plaintiff who stands in Litchfield's shoes, holding under him by a quit-claim deed, is clamorous in his charge of fraud, on the ground that there is an unlawful preference of creditors. The plaintiff while making these charges is endeavoring to hold the property worth \$3,500, for a debt originally but \$122.16, which cost him only \$171.66, and thus defeat two other creditors holding just claims, one for \$335, and the other for about \$300. A court of equity will not aid him in his grasping enterprise; it will not be moved to come to his aid in order to enforce a title based on a sheriff's deed and sale for a consideration so inadequate. His hands are not clean enough to be held up in a court of equity. They smell of oppression and avarice. He is entitled to no relief.

IV. Plaintiff insists that Mrs. Lane's mortgage is not based upon a valid claim against the church, for the reason that the note of her husband to Teabout was a contribution to pay the debt of the church. This we think is true. But the claim of Litchfields is of the same character, and differed from Mrs. Lane's claim in no respect. If the church may be compelled to pay the Litchfield claim, we think plaintiff ought not to complain that it voluntarily secured Mrs. Lane's claim.

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V. We may remark appropriately that the case on the part of the defendants, as the trustees of the church, shows that they sacrificed the property of the church without any effort disclosed by the evidence to save it. For trifling debts they permitted valuable property to be lost. In this they were unfaithful to their trusts.

The plaintiff, as we have shown, has no standing in a court of chancery, nor can his actions be approved *in foro conscientiae*, and when tried by the principles of the gospel he preaches, are subject to severe condemnation.

Under the pleadings in the case, no relief can be granted to the church, even if it be entitled thereto, according to the rules of equity. We make no inquiry as to its rights and equities.

The decree of the Circuit Court dismissing plaintiff's petition is

AFFIRMED.

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NOTES OF CASES NOT OTHERWISE REPORTED.

RICHARDS V. BURDEN ET. AL.

PARTNERSHIP: DISSOLUTION OF: CONFLICTING TESTIMONY CONSIDERED IN DETERMINING THE RIGHTS AND LIABILITIES OF VARIOUS PARTIES.

ON REHEARING.

1. PRACTICE IN SUPREME COURT: RE-HEARING: QUESTION TO BE TRIED. A re-hearing of a cause by the Supreme Court is a new trial regardless of the former opinion of the court; and the essential question is not whether the former opinion shall be adhered to, but whether the judgment of the court below shall be affirmed.
2. ——: ——: COURT EQUALLY DIVIDED. Hence, when the court on the rehearing of a cause is equally divided as to whether the judgment of the lower court should be affirmed, that judgment stands affirmed by operation of law, and that regardless of the fact that the court in its first opinion may have thought that the judgment should be reversed. *Beck, J., dissenting.*

Appeal from Dubuque District Court.

THURSDAY, APRIL 21.

THIS action was commenced on the 18th day of September, 1869, for the dissolution of the partnership existing between the plaintiff and the defendant, George Burden, the distribution of the partnership assets, the appointment of a receiver, and an injunction to prevent the defendants, Eliza A. Burden, and Richard Babbage, from disposing of certain firm property placed in their possession by the defendant, George Burden. The defendant, Eliza A. Burden, filed an answer and cross bill, asking that her account for a large amount of money advanced to the firm of Richards & Burden be stated and allowed. The defendants, George and Eliza A. Burden, also filed a cross-bill asking the enforcement of a certain contract entered into, as alleged, between the plaintiff and the defendants, George and Eliza A. Burden, for the conveyance of certain lands in Mitchell and Chickasaw counties. On the

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18th day of September, 1869, John Hodgdon was appointed receiver of the effects of the partnership, and an injunction was granted as prayed. On the 27th of November, 1869, by consent of parties, the cause was referred to D. C. Cram, Esq., to take proofs and report on the issues and state an account. On the 12th day of July, 1876, the referee filed his report, containing a very full and exhaustive presentation of the facts, and embracing seventy distinct findings. The plaintiff and each of the defendants, George and Eliza A. Burden, excepted to certain portions of the report. At the November term, 1877, of the District Court, an interlocutory decree was entered sustaining, in part, the exceptions of each of the parties. The cause was again referred to the same referee for supplemental report upon certain matters indicated in the interlocutory decree. On the 6th day of March, 1878, the referee filed his supplemental report, upon which, on the 20th day of July, 1878, the District Court entered final decree. This decree renders judgment in favor of Eliza A. Burden against the firm of Richards & Burden for \$6,276.41. It is further adjudged that the balance due plaintiff from the firm of Richards & Burden, January 1, 1878, was \$26,778.20. It is further adjudged that the firm of Richards & Burden recover from the defendant, George Burden, the sum of \$20,999.07. It is further ordered that the firm of Richards & Burden be dissolved. No relief was granted against the defendant, Richard Babbage. The plaintiff and each of the defendants, George and Eliza A. Burden, appeal. The facts necessary to an understanding of the various points ruled are stated in connection with the discussion of the points respectively.

Griffith & Knight, for the plaintiff.

George Crane and Robinson & Lacy, for the defendants.

DAY, J.—This action was commenced on the 18th day of September, 1869. For nearly nine years it was pending in the court below. On the 29th day of July, 1878, final decree was entered in the court below, which was satisfactory to neither party. On the 20th day of September, 1878, the defendants perfected their appeal. On the 11th day of October, 1878, the plaintiff perfected an appeal. The cause involved the partnership business of the plaintiff and the defendant, George Burden, for a period of about fifteen years, and questions of a collateral nature connected with the partnership. The parties differ, almost *toto caelo*, and the controversy has engendered a bitterness of feeling greatly to be deplored. In view of the many points in controversy, the great mass of the testimony, its unusually conflicting character, and the pertinacity with which the views of the respective parties are urged, it is scarcely to be hoped that we will be able to make a disposition of the case more satisfactory to the parties than that made by the referee and the court below. Where questions of fact are to be determined upon conflicting evidence, it rarely happens that a conclusion can be reached which will meet with universal approval from parties indifferent as to the result, much less from parties deeply interested upon opposite sides. Oftentimes the tribunal which has to determine can only say that the conclusion adopted is more probably correct than its opposite, and is forced to admit that against the

view reached objections may be urged which it is not possible to answer. We freely admit that we have found ourselves in this condition as to some of the questions of fact involved in this case. And yet, if no conclusion may be reached and acted upon, against which an unanswerable objection exists, individuals and courts must leave many of the most important business controversies undetermined. It is a matter of universal experience that opposite views may be maintained by unanswerable arguments. In such cases the only reasonable course is to adopt the more probable views.

In our consideration of the various questions at issue between the parties, it will not be practicable, and if practicable, it would not be profitable, to discuss all the testimony directly or remotely bearing upon them. We shall attempt no more than an allusion to the prominent features of the testimony which control our judgment. Where the evidence comes in direct conflict, and we are unable to determine a preponderance either way, we shall adopt the conclusion which in view of the whole case seems to us the more reasonable. When this test is wanting, and the evidence seems to be in *equilibrio*, we shall decide adversely to the party on whom rests the burden of proof. We now proceed to a consideration of the various questions in controversy between the parties, in an order somewhat different from that pursued by counsel,

I. As to the claim of Mrs. Burden being usurious.

During the years 1854 and 1855. Mrs. Burden, then Mrs. Holmes, placed in the hands of the plaintiff as a member of the firms to which he belonged, as shown by the evidence and found by the referee, \$10,224.72. An important question of difference between the parties is as to the contract under which the money was received. The plaintiff insists that the money was received as a loan, under an usurious agreement for the payment of twenty per cent per annum interest. Mrs. Burden insists that the money was furnished to the firms as her agent to be employed by them in time entries, they to account for one-half of the profits, and to have the other half as compensation for their services. The referee and the court below sustained the view of the defendant, Mrs. Burden, as to this question, and held that the agreement was not usurious. On the 30th day of May, 1856, the plaintiff rendered to Mrs. Eliza A. Holmes, now Mrs. Burden, a statement of account. Appended to this account he wrote as follows: "Eliza A. Holmes has paid to me the above amounts in all, and she should receive them and twenty per cent., in all from T. R. & D. and T. R. & B., from date of being received to this date, less her debit account and one-half house expenses." The plaintiff places great reliance upon this memorandum as sustaining his view of the case. In our opinion it is equally consistent with the view of the defendant, Mrs. Burden. The evidence shows that in the time entry business forty per cent was exacted of the party for whom the entry was made. If he paid for the entry, forty per cent profit was realized upon the investment. At the time this memorandum was made it was supposed by the parties that, if the entry was forfeited and the firm had to keep the land, the land was worth as much as the original investment and forty per cent thereon. So that, in either event, the firm supposed that investments made were yielding a profit of forty per cent.

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It is therefore perfectly consistent with the claim of Mrs. Burden that the plaintiff should say, when rendering his account, that Mrs. Holmes should receive the various sums advanced, and twenty per cent from date of being received. On the 4th of July, 1856, the plaintiff rendered another account in which the sums due are designated as principal and interest. The fact that the plaintiff, in estimating the amount due Mrs. Burden, designated the amount above the principal sum received as interest, is a circumstance entitled to only slight consideration, in view of the other testimony in the case. The plaintiff's understanding of the manner in which this money was to be employed is derived from a letter which he wrote to the defendant, Mrs. Burden, on the 25th day of April, 1854, just after he had received the second installment of money. In this letter he says: "I have invested all your funds, \$2,000, at twenty per cent, without any charge for gold or drafts. I took the deeds in my name for convenience, and have executed a deed to you, so that the title is in you if I should be taken away. I will send you a description of the lands by and by when I have more time. The reason of my doing this is, that while you are just as safe, it saves you a great deal of trouble in constantly making deeds in Rockford, and sending to settlers here when they pay up. You understand that you have now \$3,000 invested in improved lands in Iowa, at \$1.05 per acre, most, indeed I believe all, being for one year from the time the investment was made. All this draws twenty per cent. So that your income from this source is \$600 per year, and, as soon as the money begins to be paid in, you can invest at the same rate, both principal and interest. I have no doubt but that you can do this, or I can for you, for five years yet at least. If we are economical, in that time you can double your money, besides living, and I now think I can make mine ten times as big. I had invested Melinda's at 40 per cent. The more I see of this business and of the men who have been in it for ten or fifteen years, the more confident I am that there is no chance for failure. Moreover, I say now, and you may keep the letter, that if you or Melinda lose anything by sending money here, or even fail of making as much as you possibly could in Illinois, I will make up the balance out of my own pocket." This letter is altogether inconsistent with the notion that the money was received as a loan to be repaid with interest.

The time location book of B. B. Richards, Taylor & Richards, and Taylor, Richards & David, contains the name of Eliza A. Holmes, opposite five distinct entries, in a column headed "names of cestui que trust, or person furnishing the money to make the location." This mode of keeping the books is inconsistent with the notion that the money of Mrs. Holmes was simply loaned to the firm, to be repaid with interest. After the formation of the firm of Taylor, Richards & Burden, the mode of keeping the books was changed, as shown by the evidence, for convenience in keeping, but it does not appear that Mrs. Holmes had any knowledge of that fact. Mrs. Burden testifies as follows: "The agreement between the plaintiff and me in regard to the first money advanced by me to him was that it was to be used in time entries through Mr. Taylor, as I understood it. The terms were that the money was to be used in time entries and I was to receive one-half of the profits (which were usually forty per cent) and the firm or the plaintiff, as my agent, the other one-half, for his services. I advanced money afterwards

never as a loan, but always for time entries. It was agreed that the title to the land entered should be taken in the name of plaintiff, or some member of the firm, as my agent or trustee. I talked with Mr. Taylor in regard to such investments. Twenty per cent from the profits was to be paid to me. I never loaned any money to Taylor, Richards & David, and never heard it mentioned till here in the court by the plaintiff. They received my money as my trustees or agents, to invest in land on time for settlers, and agreed to pay me from the profits, twenty per cent. I talked with Mr. Taylor and the plaintiff about it. I did not loan any money to Taylor, Richards & Burden, until the close of the year 1858, or January, 1859. I advanced some other money to Taylor, Richards & Burden, and credits from Taylor, Richards & David, which were to be used in entering land on time, as long as there were time entries to be made. My agreement with Taylor, Richards & Burden was exactly the same as my agreement with Taylor, Richards & David, as I understood it." John W. Taylor, a member of the firm of Taylor & Richards, Taylor, Richards & David and Taylor, Richards and Burden, testified as follows: "We received money from Mrs. Burden, to be invested for her in time locations. She was to have twenty per cent on the money out of the profits, and the firm investing it was to have all the profits above twenty per cent for their services."

Upon the other hand, the plaintiff testified as follows: "My agreement with Mrs. Burden, then Mrs. Holmes, from the first was that she should receive twenty per cent interest on all the money that came into my hands, without loss of time, until the same should be repaid. The lands conveyed to her, or which she held through me as trustee, were for her security, and only that. The money was to be repaid absolutely to her with interest at twenty per cent per annum." There is some evidence tending to corroborate this testimony of the plaintiff, but more corroboratory of the evidence of Mrs. Burden. Without noticing the evidence more in detail upon this branch of the case, we deem it sufficient to say that, after a careful examination of all the evidence bearing upon this question, we are well satisfied with the finding of the referee upon this point, and we concur with the referee and the court below in the conclusion that the money was not received under an usurious agreement.

II. As to the amount of Mrs. Burden's credit against the firm of Richards & Burden.

The evidence shows, and the referee found, that the money originally furnished by Mrs. Burden to the plaintiff, to be accounted for by the firms to which he belonged, was \$10,224.72. Upon this branch of the case, the testimony as shown by the abstract is as follows: John W. Taylor testified: "At the close of 1858 the accounts of the different members of the firm were made up, and each member of the firm, and others who had advanced money for the time locations, were credited with the twenty per cent as if realized profits. Many of the time locations were not then paid up, and it was uncertain whether they would be. The value of the land was uncertain, but the firm had confidence that it would ultimately prove a good investment and yield at least the profits credited to those advancing money. It was understood that the firm should keep the land and pay the profits as credited

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upon the books. Taylor, Richards & Burden received Mrs. Burden's money upon the same conditions that the firms before them did, but they did not set apart to her specific locations and keep an account with them. We preferred to assume the profits were made and credit accordingly. It was impossible to determine the exact profits on time locations, but we thought that justice to Mrs. Burden and to others furnishing money required us to assume that profits enough were made in one way and another to entitle them to twenty per cent."

The defendant, George Burden, testified as follows: "It was understood between Mrs. Burden, John W. Taylor and Richards & Burden, in regard to Mrs. Burden's money and interest in time entries at the close of 1858, that she should be settled with upon the basis of twenty per cent credits for the money advanced by her, less her debits, and that Richards & Burden should retain her money as a loan, and that she should have no interest in the lands."

The plaintiff testified as follows: "The simple truth is, that on December 31, 1858, Mrs. Burden received credit of twenty per cent per annum for the preceding year, making her gross credit on that day \$10,320.47. That credit has stood there from that time to this without change, without agreement of any kind, but simply left there, by consent of all parties, except of course the pretended agreement of May 25th 1869." Upon this evidence the referee found that the balance of \$10,220.47 must be held as an account stated of the amount due Mrs. Burden, January 1, 1859. As against the firm we think the finding of the referee is correct. We understand the plaintiff to object to this statement only upon the ground that the money was received under an usurious contract, and that the firm is liable only for the principal sum. It is claimed that, if the balance of January 1, 1859, was usurious, making it or calling it an account stated does not purge it of usurious complication. This is true. But if, as we have found, the money was not received under an usurious contract, and the firm dealt with the money in such a manner that it cannot tell what profits were realized from the money of Mrs. Burden, then Mrs. Burden should be allowed to accept and enforce against the firm whatever arrangement the firm substituted for the original agreement, rendered incapable of enforcement by the manner in which the firm conducted the business. Mrs. Burden accepts the statement as correct, and concedes that since the first day of January 1859, her money has remained with the firm of Richards & Burden as a loan simply. The amount thus stated as due January, 1859, \$10,320.47, should be made the basis of the settlement of the accounts between the parties.

III. As to the rate of interest which Mrs. Burden should be allowed since January 1, 1859.

Mrs. Burden concedes that the amount of her money in the hands of Richards & Burden, on the first day of January, 1859, remained with them thereafter as a loan. She claims that the firm agreed to allow her thereon interest at the rate of ten per cent, payable annually. The plaintiff claims that no agreement as to interest was made. The evidence upon this question leaves it in very great uncertainty. The referee allowed Mrs. Burden on her account against the firm from January 1st, 1869, interest at the rate of seven

per cent per annum, with annual rests, and held that the firm at no time made any other obligatory contract with her as to interest on her open account. Taking the evidence all together, we think it is not shown that prior to some time in 1862 the firm had any agreement with Mrs. Burden as to the rate of interest to be allowed. It appears from a preponderance of the evidence that the defendant, George Burden, subsequently to his marriage with Mrs. Burden, executed to her, in 1862, a written agreement on behalf of the firm for the payment of interest at the rate of ten per cent per annum, payable annually. It appears also that, some time in 1865, this written agreement was surrendered, and the defendant, George Burden, executed another written agreement for the payment of ten per cent interest, covering the amounts embraced in the first agreement, and others subsequently advanced. Both of these written agreements are lost.

It appears from the evidence that the plaintiff had no knowledge of the execution of these agreements on behalf of the firm. It is true that, under ordinary circumstances, one partner has authority to settle a debt of the firm and to execute an agreement to pay thereon any legal rate of interest. But the relations of these parties are so peculiar that we think this principle should not apply. At the time these contracts were executed, the defendant, George Burden, was the husband of the creditor of the firm, Mrs. Burden. He was directly interested in swelling the amount of the claim against the firm. In making this agreement he did not occupy the usual position of a partner solicitous only to guard the interests and protect the rights of the firm. He had an interest adverse to the interests of the firm. If the defendant, George Burden, had been himself the creditor of the firm, and he had executed to himself on behalf of the firm an agreement to pay upon an open account ten per cent per annum interest, payable annually, it would hardly be insisted that such agreement could be enforced. But his interest is in fact scarcely less direct and actual than if he were himself the creditor. We think that, conceding these written agreements to have been executed at the times stated in the testimony of the defendants, they cannot be enforced against the firm. Interest at a greater rate than six per cent per annum can be allowed only when the parties agree in writing for the payment of such rate. Code, § 2077; *Thrift v. Redman*, 13 Iowa, 25; *Myers v. Smith*, 15 Id., 181; *Lommen v. Tobiason*, 52 Iowa, 665. The referee and the court below allowed Mrs. Burden seven per cent per annum with yearly rests. It is probable that the finding of the referee upon this point is based upon inventories of the firm made in 1861, 1862 and 1865, in which the sums due Mrs. Burden seem to be computed at seven per cent. We have no doubt from the evidence that the firm expected to pay, and Mrs. Burden to receive, interest at the rate of seven per cent, payable annually. Still we do not think the inventories establish a written agreement for the payment of interest at that rate. They were made for the purpose of obtaining an approximate estimate as to the condition of the firm. We think that, since January 1, 1859, Mrs. Burden should be allowed on her credits against the firm interest at the rate of six per cent, and that upon her debits she should be charged at the same rate, both to be computed in the manner set out in the twentieth finding of the referee.

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IV. As to the \$4,000 furnished by Mrs. Burden, but not credited to her on the books of the firm.

The evidence shows that of the \$10,224.72, originally furnished by Mrs. Burden to the plaintiff, the following items: \$2,500, April 26, 1855; \$600, May 28, 1855; \$600, July 7, 1855, and \$300, August 11, 1855, were not entered upon the books of the respective firms to the credit of Mrs. Burden, and they form no part of the \$10,320.47, standing to her credit on the first day of January, 1859. About the 30th day of May, 1856, the plaintiff executed to Mrs. Burden, then Mrs. Holmes, on account of these several items, aggregating \$4,000, his promissory note for \$5,000. The note has been destroyed. The plaintiff insists that the note bore an usurious interest, twenty per cent. Mrs. Burden claims that the note bore but ten per cent. As to the rate of interest upon the note the testimony is in direct conflict. The fact of the execution of the note being admitted, the presumption of the law is that it was in accordance with, rather than in violation of, the law. The burden of proof is therefore upon the plaintiff who asserts that the note was usurious. The evidence appears to be *in equilibrio*, and hence this point must be determined adversely to the party on whom rests the burden of proof. It follows that the referee correctly found that this note bore interest at the rate of ten per cent. It is claimed that this sum of \$4,000 was entered upon the books of Taylor, Richards & Burden to the credit of Richards; that in his accounts with the firm he was allowed twenty per cent thereon, and that, as it was a trust fund misapplied, he should account to Mrs. Burden for the profits actually realized thereon. We think this position would be correct if Richards actually obtained a credit upon the books for this amount. Upon this question the testimony is conflicting. Richards testifies that he used it in personal transactions, and did not obtain credit upon the books of the firm for that amount. We have examined all the evidence bearing upon this question with great care, and while we concede that the point is not clear of doubt, yet we do not feel that the evidence warrants a finding that Richards obtained credit upon the books for this sum. The mode adopted by the referee of charging the plaintiff with the several sums making up this \$4,000, as set forth in the 13th finding of fact, is correct. The plaintiff is properly chargeable with six per cent interest until the note was executed, and with ten per cent thereafter, until liquidated by the amounts chargeable to Mrs. Burden for household expenses.

V. As to the contract between the plaintiff and Mrs. Burden respecting household expenses.

The plaintiff is a brother of the defendant, Mrs. Burden. In 1854 the plaintiff was a widower, with a son three and one-half years old. The defendant, Mrs. Burden, then Mrs. Holmes, was a widow, residing at Rockford, Illinois, having a younger sister, Melinda Richards, living with her. It was arranged between the plaintiff and Mrs. Holmes that these four should constitute a family at Dubuque. Pursuant to this arrangement, Mrs. Holmes removed with her household effects to Dubuque, and she and the plaintiff commenced keeping house on the 25th day of December, 1854. In January, 1857, Melinda Richards married Mr. Hervey and removed to Des Moines. During the years 1856 and 1857, Mr. Burden, who was then a suitor of Mrs.

Holmes, became a guest of the family, and remained about one year. In the fall of 1857, Mrs. Hervey and her husband returned to the family, where four children were born to them, three of whom survived. Mrs. Hervey and her three children continued members of this household as long as it existed, and her husband about seven years of the time. In November, 1857, the father and mother of the plaintiff and of Mrs. Holmes became members of the family, and so continued during its existence. With the father and mother came three small children, one an infant of Mrs. Waldo, a deceased sister of plaintiff and Mrs. Holmes. Two aunts of the plaintiff and Mrs. Holmes during the period of their housekeeping visited them, and spent about one year each. In November, 1861, the defendant, George Burden, married Mrs. Holmes, and became a member of the household. During all this period Mrs. Burden was recognized as the mistress of the family. Invitations to parties and to social entertainments were issued in her name, and she entertained her friends at pleasure. In this manner these parties resided together until the first of October, 1865. During this period neither of the defendants contributed anything to the household expenses, with the exception of \$87.50, contributed by Mrs. Holmes to the payment of rent. From the first day of October, 1865, until June, 1866, when the defendants removed to their own house, an account of family expenses was kept, and they were paid out of the income of the firm.

The plaintiff claims that it was agreed between himself and Mrs. Holmes that each should bear one-half of the household expenses. Mrs. Holmes concedes that such agreement was originally made, but insists that it was conditioned upon the family continuing as constituted when the agreement was made, and upon her continuing to receive twenty per cent per annum profits upon her money in plaintiff's hands; and that the agreement was abandoned in 1856. The evidence upon this branch of the case is very conflicting. We feel, however, constrained to hold that it does not establish the conditions nor the abandonment claimed. All of the persons who became members of the family, or who were entertained as guests, were as nearly related to Mrs. Holmes as to the plaintiff. We are satisfied from all the evidence that she derived as much comfort, and received as many advantages, from the joint house keeping arrangement, as did the plaintiff. We see nothing unjust or inequitable in requiring her to bear one-half the expense of securing for herself, her needy sister, her aged parents, her sister's orphaned children, and her husband, a comfortable home, in which for eleven years she was permitted to preside as undisputed mistress, and to entertain her friends at pleasure, without question or restraint.

VI. As to the amount which should be charged to Mrs. Burden for household expenses.

The referee found that the household expenses, one-half of which should be charged to Mrs. Burden, were, from December 25, 1854, to December 25, 1862, \$1,312 per year, and from December 25, 1862, to October 1st, 1864, \$2,000 per year. The court modifies this finding so far as to fix the amount of expenses at \$2,000 per year for the whole period from December 25, 1854, to October 1, 1865. The referee based his finding principally upon a statement, made by the plaintiff, of household expenses for five and

one-half years. We have carefully examined the evidence upon this point, and we think it sustains the finding of the referee. The expense account should remain as fixed by the referee. Interest should be computed and the amounts applied upon the \$4,000 and interest, as indicated in the fourteenth finding of the referee.

VII. As to whether the plaintiff is entitled to credit upon the firm books for the amount of the uncles and aunts accounts.

This is one of the most important and difficult questions at issue between these parties. The referee very pertinently says upon this branch of the case, that "the conflict in the evidence is appalling." We have with great care examined the entire evidence bearing upon this question. It is useless to attempt to reconcile or harmonize the testimony. The conflict is utter and hopeless. The referee, in his report, allowed the plaintiff to have the benefit of a credit for these accounts. The court set aside this finding of the referee, and struck out these sums from the plaintiff's credit, thus reducing his balance on the first day of January, 1856, in the sum of \$7,470.70.

Prior to the formation of the partnership of Taylor, Richards & Burden, certain uncles and aunts of plaintiff, residing in New York, sent the plaintiff money to be used in his discretion, for which he issued his individual receipts or notes, promising to pay them twenty per cent per annum. This money was credited to the uncles and aunts on the books of Taylor, Richards & David, and was used by them in their time entry business. After the firm of Taylor, Richards & Burden was formed, these credits to the "uncles and aunts" were transferred to the books of Taylor, Richards & Burden. As the books then stood, the firm of Taylor, Richards & Burden appeared to be the debtor of the "uncles and aunts," although the money was furnished to B. B. Richards, and the "uncles and aunts" as we think the evidence shows, looked to him for payment. The credits so stood until October, 1858, when the plaintiff caused the "uncles and aunts" to be charged upon the books of Taylor, Richards & Burden with the amount appearing to their credit upon the books, and took credit himself on the books of the firm for the same amount. At the time of this transaction no payment was made to the "uncles and aunts." When these transfers were made to the plaintiff, so far as the firm was concerned, the debt to the "uncles and aunts" became the individual debts of the plaintiff, as they were at the beginning. What was the purpose in making this transfer we are unable to determine from the evidence. It is claimed by the defendant, George Burden, that this transaction was fraudulent as to the firm, in that it would enable Richards to settle with the "uncles and aunts" for less than the sum actually due, and charge the firm with the whole amount advanced and interest. But we are satisfied that no such fraudulent purpose could have been contemplated at the time the transfer was made, for the firm then believed itself solvent, and expected to pay all its liabilities in full. It seems to us, therefore, that if the "uncles and aunts" were willing to regard the plaintiff as sole debtor, it could make no real difference to the firm whether the amount of these accounts stood upon the books of the firm to the credit of the plaintiff, or to the credit of the "uncles and aunts." If the plaintiff had in fact paid the "uncles and aunts," no real injury would have been done to any one by

the transfer of accounts upon the books. But, as we have said, the "uncles and aunts" were not paid. The defendant, George Burden, was informed of the transfer soon after it was made. He testifies that he frequently protested against the change, and that the plaintiff promised to place the accounts back to the credit of "uncles and aunts" all of which the plaintiff most vigorously and emphatically denies.

Each member of the firm of Taylor, Richards & Burden was to furnish all the money he could, and was to have twenty per cent per annum on his money out of the profits of the business, and all profits after allowing this were to be divided equally between the partners. This arrangement was made under the supposition that the profits of the business would be at least forty per cent per annum upon the money employed. The money furnished by each partner was placed to his credit. The firm assuming and believing that profits had been made in excess of the twenty per cent agreed to be paid each partner, on the 31st day of December 1856, 1857 and 1858, entered upon the books of the firm to each partner a credit of twenty per cent interest upon the amounts by each member advanced to the firm. As a result of this mode of procedure, on the first day of January, 1859, Burden had a general balance to his credit on the books of the firm of \$27,772.93, and Richards had a general balance of \$18,862.60. Of the balance in favor of Burden, \$10,607.16 was the assumed annual profits of twenty per cent; and of the balance in favor of Richards, \$7,068.14, was the assumed annual profits of twenty per cent. It thus appears that the assumed profit in favor of Burden exceeded the assumed profit in favor of Richards in the sum of \$6,539.02. The parties agreed that the balances existing on the first day of January, 1859, should draw interest at the rate of ten per cent. From the outlook in 1860 it began to appear that the parties had not in fact realized profits. As the defendant, George Burden, had advanced much more money than the plaintiff, it is apparent that, to credit up both parties with profits which had not been realized, would tend to swell, in a proportionate degree, the defendants' credit against the firm, and to place the plaintiff at a proportionate disadvantage. In 1860, the plaintiff began to complain of the twenty per cent which had been annually added to the amounts advanced by each partner in line of profits which had not then been realized. As a result of negotiations between the parties, on the 8th day of May, 1860, they entered into a contract of which the following is a copy:

"Memorandum of agreement between Benjamin B. Richards and George Burden, of Dubuque, Iowa:

"Said Richards agrees to put in his share of the lands of Taylor, Richards & David, as per list accompanying this memorandum, as assets of the firm of Taylor, Richards & Burden, at three dollars per acre, amounting to 3,378 acres, and being one-third of 10,134 acres, he to have a credit of \$10,134 for the same, said lands to be taken subject to all tax liens, but in case the title to any of these lands should prove defective in said Taylor, Richards & David, and the lands should be lost through such defect, said Richards to make good said Burden for his loss through such defect. The credits of said Richards with the said T., R. & David, and his interest in any other assets than lands, and his liabilities as a member of such firm of T., R. & David, not to be affected by this transfer of his interest in said lands. In consider-

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ation that said Richards does hereby transfer his undivided third interest in and to the lands aforesaid, and dose make and constitute them assets of the firm of Taylor, Richards & Burden, so that said Burden shall have the same interest in said lands that said Richards has, said Burden agrees to allow said Richards a credit of \$10,134, being \$3 per acre for said lands, on the books of said T., R. & Burden; said Burden also agrees that the interest of himself and said Richards shall draw interest only at the rate of 7 per cent per annum from and after the first day of January, 1859, instead of 10 per cent, as heretofore agreed upon between said T., R. & Burden. Said Burden also agrees to consider the debt due to the aunts and uncle Billings, in Saratoga county, N. Y., and for which said Richards has given his individual notes as the debt of said Taylor, R. & Burden, and to jointly, with said Richards, secure and pay said debt as he and said Richards shall be able."

The value of these lands, \$10,134, just about equalized the plaintiff's and George Burdens' credits against the firm, allowing the plaintiff to retain credit for the amount of the "uncles and aunts" accounts. As we have before said, the transfer of these accounts to the plaintiff would have wronged no one if the "uncles and aunts" had been in fact paid. But in this agreement Burden agrees to consider the debt due to the aunts and uncle Billings, in Saratoga county, N. Y., as the debt of said Taylor, Richards & Burden, and to jointly, with said Richards, secure and pay said debt. Jonas S. Billings, one of the uncles to whom Richards was indebted, did not reside in Saratoga county, and was not embraced in this agreement. From a careful examination of all the testimony bearing upon this branch of the case, we feel reasonably well satisfied that this contract was entered into upon the basis of the credits as they stood upon the books, embracing the credit to the plaintiff of the "uncles and aunts" accounts, and that this credit cannot be disturbed, without ignoring this agreement. It is true that, upon this supposition, the plaintiff receives credit for the whole of a debt, a part of which the defendant Burden agreed to pay. But as an offset to this the defendant Burden was permitted to retain a credit against the firm for \$3,539.02, on account of profits which were not realized, which greatly exceeds the part of the debt to the "uncles and aunts" which he agreed to pay. If his agreement to pay a part of this debt was contingent upon the plaintiff's credits being reduced by the amount of the "uncles and aunts" accounts, it is unaccountable that the agreement should have been made without any stipulation for the reduction of the plaintiff's credits. The construction which we place upon the agreement does no wrong to the defendant, Burden. It simply offsets his credit for profits which had not been realized, by his obligation to pay a debt for which the plaintiff was allowed sole credit. The contract made the credits of the two parties almost equal on the 8th day of May, 1860, and placed them, as nearly as practicable, upon an equal footing. We think the referee properly found that the plaintiff's credits should not be disturbed, and that the court erred in striking from the plaintiff's credits the amounts of the "uncles and aunts" accounts.

VIII. As to whether the Chickasaw and Mitchell county land contract is binding between plaintiff and Mrs. Burden, and her right to enforce the same.

On the 9th day of January, 1868, the plaintiff and the defendant, George Burden, executed a written contract, as follows: "It is agreed between George Burden, Eliza A. Burden and B. B. Richards as follows: That George Burden and Eliza A. Burden take from the firm of Richards & Burden as follows: All the land the said firm has in Mitchell and Chickasaw counties, at \$4.50 per acre, which includes sw 3, 95, 12, which is a tax title, and the land of Stimpson, when they, R. & B., have obtained title from Stimpson. These lands to be charged to Eliza A. and Genrge Burden as of January 1, 1868. They, R. and B., are to guarantee all titles except sw 3, 95, 12. Also, the said firm are to let Eliza A. Burden have eight thousand dollars of their bills receivable, George Burden to select one-half, and B. B. Richards one-half, of such bills receivable, or the firm may elect to give five thousand dollars in such bills receivable in the mentioned, and in that case, the said firm shall give their note for three thousand dollars to Eliza A. Burden, payable in six months at seven per cent interest; if not paid at the expiration of said six months, the said note is to draw ten per cent until paid; interest payable annually. The amount of one-half of said lands to be charged to Eliza A. Burden in account with Richards & Burden, the other half to George Burden in same account."

Each of the defendants, in a cross petition, asks a specific performance of this contract, and that a conveyance to them of the lands referred to may be decreed. This contract was signed by B. B. Richards and George Burden on the 9th day of January, 1868. It was then placed in the firm safe, where it remained until about the last of March, 1869, when it was signed by Mrs. Burden. The evidence is utterly conflicting as to whether Mrs. Burden was present at the time the contract was signed by Richards & Burden. The referee has found from the evidence that she was not present. We do not deem it essential to a conclusion upon this branch of the case to determine this question. The evidence shows that, if Mrs. Burden was present, the contract was not then read over in her hearing. We cannot find from the evidence that she at that time expressed any affirmative assent to the contract, or did any act which would bind her to the terms of the agreement. Nor can we find from the evidence that at any time before the last of March, 1869, when she signed the agreement, she did any act which would have estopped her to deny that the agreement was binding upon her. So far as we can discover from the evidence, at no time before about the last of March, 1869, when Mrs. Burden signed the agreement, could the plaintiff have enforced the contract against Mrs. Burden. Up to that time the agreement was wanting in mutuality, and, if not binding upon Mrs. Burden, it could not have been enforced against Richards. We think the evidence shows that before Mrs. Burden signed the agreement she was informed that the plaintiff insisted that it was obtained from him by fraud, and that he did not intend to carry out its provisions. Before the contract was signed by Mrs. Burden it was repudiated by the plaintiff, and hence as between these parties there was no *aggregatio mentium*, and no contract. For this reason,

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and for others which might be suggested, we feel satisfied that Mrs. Burden is not entitled to have a specific performance of this contract.

IX. As to whether the defendant, George Burden, is entitled to a specific performance of the Chickasaw and Mitchell county contract.

The evidence shows that the contract in question was presented to the plaintiff just upon the eve of his departure to attend a session of the Iowa legislature. The plaintiff was in fact, as it appears, on his way to the depot, and called into the office only for a few moments, when the contract was presented for his signature. He hastily read over the contract, wrote in pencil upon the margin, "Wrong as to the Stimpson land," and signed it. The Stimpson land is a part of the land covered by the agreement. The evidence shows that the defendant, George Burden, did not understand the nature of this marginal memorandum. As late as the latter part of March, 1869, when he showed the contract to his attorney, he was of opinion that the marginal memorandum was, "wrong as to the stamps on land," and he asked the opinion of his counsel as to whether the contract was sufficiently stamped. It thus appears that the parties did not assent to the same agreement. The defendant, George Burden, supposed he was procuring a contract for the conveyance of the "Stimpson land," and one which in every respect as to such land was right and binding. The plaintiff understood that he was reserving the Stimpson lands from the operation of the contract, or at least providing that in some respect as to these lands the contract was wrong. "There is no contract, unless the parties thereto assent; and they must assent to the same thing, in the same sense." 1 Parsons on Contracts, fifth edition, page 475, and note a. It is evident, we think, that the parties to this contract did not assent to the same thing in the same sense. That, of itself is a sufficient reason why the contract should not be specifically enforced.

There are other reasons why there should not be a specific performance of this contract. The defendant, George Burden, for many years had been the book-keeper of the firm. The plaintiff insists that George Burden procured the execution of this contract by falsely and fraudulently representing that the plaintiff was very largely indebted to Mrs. Burden and the firm, and that the agreement for the conveyance of this land was made for the purpose of paying off, in part, the plaintiff's indebtedness to Mrs. Burden, and equalizing his credit with the firm. The defendant's counsel concede that Mr. Burden represented to the plaintiff that his account with the partnership was largely overdrawn, and insist that the representation was based upon the claim that the "uncles and aunts'" accounts, and \$4,000 advanced by Mrs. Burden, should be taken from the plaintiff's credits. Counsel in this argument say: "There is no doubt that Mr. Burden insisted and represented that the plaintiff was largely overdrawn on their partnership account, and for that reason urged that these lands should be sold to himself and wife in part payment of such overdraft. It is also true that before the contract of January 9, 1868, Mr. Burden claimed that the "uncle's and aunts'" accounts should be stricken from the plaintiff's credits, and that the \$4,000 advanced by Mrs. Burden should be taken from plaintiff's account and credited up to her account. The defendants claim that this contract was to diminish the large balances

in their favor, as would be shown by a correction of the books in reference to the above items, and that plaintiff always conceded, till the open rupture, that said items were to be corrected or changed as claimed by defendants." And again: "The truth is that Mr. Burden did represent that plaintiff was overdrawn to the extent of twenty thousand dollars or more, and plaintiff believed this representation to be true and, knew at the time it was based upon the \$4,000 item, and the striking out of the "uncles and aunts" account.

We have already determined that the \$4,000 item did not constitute a part of plaintiff's credit on the books of the firm, and that the "uncles and aunts" accounts should not be stricken out of the plaintiff's credits. It follows, therefore, that, if the agreement to convey these lands was made, as claimed to offset credit, which plaintiff had upon the books, and to which he was not entitled, there has been a failure of consideration for this agreement, and for that reason no specific performance of it should be decreed.

There is another reason why specific performance of this contract should not be decreed, which to our minds is quite satisfactory. It is fully apparent from the testimony that the sole inducement for the making of the contract upon the part of the plaintiff was to bring up his credit against the firm, so that it would the more nearly equal the large balance which was supposed to exist in favor of the defendant, George Burden. About the first day of April, 1869, the defendant, George Burden, took possession of the assets of the firm to a very large amount, and on the 23rd day of July, 1869, he sold real estate of the firm, the title of which stood in his name, to the amount of \$17,986.58, for which he is liable to account. As a result of this transaction and all the dealings of the parties, it is found by the final report of the referee and the decree of the court, that, after disallowing to the plaintiff credit for the "uncles and aunts" accounts, there was due the plaintiff from the firm of Richards & Burden, on the first day of January, 1878, the sum of \$26,778.20. It was also found that the defendant, George Burden, was indebted to the firm at the same date, in the sum of \$20,939.07. This includes charges to the defendant, George Burden, growing out of sales of the Chickasaw and Mitchell county lands, in the sum of \$18,038.38. So that, independently of all debits on account of the Chickasaw and Mitchell county lands, the defendant, George Burden, was indebted to the firm in the sum of \$2,900.69. If then we should now enforce a specific performance of this contract, we would transform what was intended as a mere arrangement for the equalization of the credits of the partners, into a mere contract for the sale of partnership property at much less than its actual value, and, having compelled a conveyance, we would be obliged to decree payment of the contract price. What was intended to be accomplished by this contract has already been effected through other means, and there is now neither necessity for, nor equity in, decreeing a specific performance of this agreement. For these reasons, and others which might be presented, we feel satisfied that specific performance of this contract should not be enforced.

X. *As to the amount of credit plaintiff should receive for the adjustment of J. L. Billings' account.*

J. S. Billings is one of the "uncles" whose account the plaintiff credited to himself, and of which, as between himself and the firm, he thereby as-

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sumed the payment. J. S. Billings did not reside in Saratoga county, and Mr. Burden did not assume the payment of any part of the debt due him, in the contract of May 8, 1860.

The debt due J. S. Billings is included in the credits which the referee found the plaintiff entitled to on January 1, 1859, and is embraced in the \$7,470.70, the amount of the "uncles and aunts" accounts, stricken out of plaintiff's credits by order of the court. As we find the plaintiff entitled to credit for the whole amount of the "uncles and aunts" accounts, it follows that he is entitled to no additional credit for the amount paid J. S. Billings. The court below allowed plaintiff the amount of a note which he executed in settlement with J. S. Billings, but this was upon the basis of disallowing credit for the "uncles and aunts" accounts.

XI. As to whether the plaintiff should be charged for the money loaned to C. F. Billings.

C. F. Billings, a son of J. S. Billings, and cousin of the plaintiff, borrowed of the firm of Taylor, Richards & Burden, August 25, 1857, \$221, and September 25, 1857, \$221.30. The defendant, George Burden, claims that the plaintiff guaranteed the payment of these sums. This the plaintiff denies, and testifies that the loan was made in the ordinary course of business upon collateral security. On the 31st day of December, 1857, the amount of these loans \$442.30, was charged to the plaintiff. At the close of the year 1858, B. B. Richards caused himself to be credited with this amount, and J. S. Billings to be charged with it. The books were in this condition at the time the contract of May 8, 1860, was executed. As we have already said, this contract was made pursuant to, and in recognition of, the credits as they then stood upon the books. This credit has stood upon the books ever since the year 1858, without any protest or objection on the part of Burden, so far as the evidence shows. In view of all the evidence in connection with the contract of May 8, 1860, and the fact that the burden of proof is upon the defendant, we think the plaintiff should not be charged with this account.

XII. As to plaintiff's credit on the books of Taylor, Richards & David.

On the 31st day of December, 1856, there stood upon the firm books of Taylor, Richards & David, credits in favor of the several partners individually, as follows: in favor of John W. Taylor, \$117.02, in favor of B. B. Richards, \$961.43, and in favor of E. C. David, \$1,921.55. The plaintiff claims that he is entitled to a credit on the books of the firm of Richards & Burden for this item, and interest thereon from December 31, 1856. The referee allowed this credit in finding number twenty-six, and the court overruled the defendant's exception to this finding. In the contract of May 8, 1860, the plaintiff put in his share of the lands of Taylor, Richards & David, as assets in the firm of Taylor, Richards & Burden, but he reserved all other interests in the assets of the firm of Taylor, Richards & David. This contract provides: "The credits of said Richards with the said Taylor, Richards & David, and his interest in any other assets than lands, and his liabilities as a member of such firm of Taylor, Richards & David, not to be affected by this transfer of his interest in said lands." On the 21st day of January, 1861, E. C. David

agreed to quit-claim to George Burden all his interest in the lands, notes, accounts and other assets of the firm of Taylor, Richards & David. On the 8th day of June, 1864, John W. Taylor entered into a contract with George Burden & B. B. Richards, in which he agreed to settle certain claims of the firm of Taylor, Richards & David, and to transfer and to convey to Burden & Richards all his right, title and interest in the assets, whether real or personal, of the late firm of Taylor & Richards, Taylor, Richards & David, Taylor, Richards & Burden, and Taylor, Bennett & Co. In this contract Richards & Burden agreed as follows: "In consideration of the above agreement, the said Burden & Richards hereby agree to assume all the liability of said Taylor for any of the debts or liabilities of said firms of Taylor & Richards, Taylor, Richards & David, Taylor, Richards & Burden, and Taylor, Bennett & Co., so far as the same appear in any of the books or in any of the accounts of said several firms, and as far as any claims have been made or presented to or known by said Richards or Burden, particularly excepting and reserving a pretended claim of Logan & Cook, by virtue of a mechanic's lien against house on corner of Bluff and Thirteenth streets, Dubuque."

It is upon this contract that the plaintiff mainly relies for the establishing of this claim against the firm of Richards & Burden.

It is conceded by counsel that the firm of Taylor, Richards & David was solvent. They had partnership assets sufficient to pay off all the claims of the individual members of the partnership against the firm. The condition of this firm was such that there was no occasion for a member of the firm, who was a creditor, to resort to another member of the firm for satisfaction of the balance due him. In the situation of the firm and the condition of the accounts, Taylor was not, as an individual, outside of his interest in the assets of the firm, liable to Richards. Hence, when Richards & Burden agreed to assume all the liability of Taylor for any of the debts or liabilities of the firms of which he had been a member, they assumed no liability to the plaintiff. It is said, however, that both David & Taylor, conveyed and transferred all their assets in the firm, and hence, there were no assets left for the payment of Richards. Whatever interest David & Taylor had in the firm they held subject to the payment of the debts of the firm, including the balance due Richards. They did no more than simply to convey their interests in the assets. These interests passed subject to the charge or claim upon them for the payment of the balance due Richards, so that, after the transfer, as well as before, sufficient assets remained for the payment of Richards, and there was no foundation for a personal claim against Taylor. Counsel for the plaintiff argue this question as though the agreement of Richards & Burden was to pay *all the liabilities of the firm of Taylor, Richards & David*, instead of, as it really is, to assume *all the liability of said Taylor, for any of the debts of said firm of Taylor, Richards & David*. Counsel refer to a subsequent agreement of B. B. Richards and George Burden, dated December 27, 1864, which, in reference to the contract of June 8, 1864, in the preamble says:

"WHEREAS, under said agreements, the said Richards & Burden were to pay and discharge all the debts and liabilities of every kind of the said * * Taylor, Richards & David," and they contend that this is explanatory of the intention of the parties to the contract of June 8, 1864. There is no am-

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bignity in that contract; its terms are plain and explicit, and they ought not to be overcome or controlled by a mere recital in a subsequent agreement, to which it may well be supposed the attention of the parties was not so carefully directed.

Counsel also refer to the provision of the contract of May 8, 1860, above set out, and insist that it preserved plaintiff's credits against the firm of Taylor, Richards & David, and that the lands transferred by him to the firm of Taylor, Richards & Burden passed subject to the payment of such credits.

The stipulation in the contract to which counsel refers is as follows: "The credits of the said Richards with the said Taylor, Richards & David, and his interest in any other assets than lands, and his liabilities as a member of such firm of Taylor, Richards & David, not to be affected by this transfer of his interest in said lands." The only effect of this provision is to continue Richards' credit with the firm, and his liability as a member of the firm, after the contract as before.

It is claimed, however, that Richards & Burden have succeeded to all the assets of the firm of Taylor, Richards & David, and that therefore they are under obligation to pay the debts of that firm, including this credit claimed by plaintiff. This involves a consideration of the question whether the firm of Taylor, Richards & David was, in fact, indebted to the plaintiff. As we have before stated, the credits in favor of the respective members of that firm are as follows: J. W. Taylor, \$117.02; B. B. Richards, \$961.43; E. C. David \$1,921.55. These together amount to just \$3,000. The firm is therefore indebted to the members of the firm \$3,000, each partner's share of this debt is \$1,000. So that while the plaintiff has a claim against the firm for \$961.43 upon an adjustment of the claims owing by the firm, the firm has a claim against him in the sum of \$1,000, which is \$3,857 more than the firm owes him. In fact then the firm did not owe the plaintiff, but plaintiff owed the firm. Counsel for the plaintiff concede that this would be the case if the firm was insolvent, but they insist that, if the firm had just \$3,000 of assets, enough to pay all its debts, each member of the firm must be paid in full, from which they infer that the firm owes each partner the amount of his claim. Suppose then the firm to owe no claims, except to the individual partners, and to have assets just to the amount of \$3,000, each partner's share in these assets is \$1,000, and each partner is entitled to have his claim paid. Suppose these assets were equally divided, there would still be a debt of \$921.55 due E. C. David, while the plaintiff would be overpaid \$38.57, and J. W. Taylor would be overpaid \$832.93. It follows that Taylor and the plaintiff must surrender the over-payments to them to make up the deficit in favor of David. Hence the plaintiff must contribute of his share of the assets to pay the debts of the firm; and he would have to contribute just so much, no matter how great the assets of the firm might be. Hence he was in fact indebted to the firm, notwithstanding his credit upon the books. It follows that he is not entitled to payment of this item from the firm of Richards & Burden.

XIII. As to the \$1,378.55 credited in favor of Taylor, Richards & Burden, on the books of Taylor, Richards & David.

On the books of Taylor, Richards & David there stands a credit in favor of Taylor, Richards & Burden, and on the ledger of Taylor, Richards & Burden, a debit in the sum of \$1,378.55. The defendant, George Burden, claims that he is entitled to a credit against the plaintiff for two-thirds of this amount, with interest from December 31, 1857, the date of the credit upon the books. The referee disallowed this claim. See the thirty-seventh finding. Richards & Burden acquired the assets of the respective members of the firm of Taylor, Richards & David, and took these assets, as we have already seen, subject to the payment of the debts which were charged upon such assets.

Richards & Burden also acquired the assets and succeeded to the property rights of Taylor, Richards & Burden. So that Richards & Burden, as the successors of Taylor, Richards & David, became liable to pay Richards & Burden, as the successors of Taylor, Richards & Burden, this sum of \$1,378.55. In other words, Richards & Burden were both creditor and debtor for this amount. This operated as a cancellation of this claim. There is no foundation for a claim against plaintiff growing out of this item.

XIV. As to whether Richards should reimburse Richards & Burden for paying the Blanchard claim, and if so, in what amount.

On the first day of September, 1855, the firm of Taylor, Richards & David executed to Ephraim Blanchard a receipt for \$1,200, which they agreed to invest in entering U. S. government land on time for settlers, retaining as their commission the profits realized above twenty per cent.

E. C. David, of the firm of Taylor, Richards & David, being in failing circumstances, conveyed, without consideration, his interest in the lands of Taylor, Richards & David, to his brother, William G. David. At the request of E. C. David, William G. David conveyed E. C. David's interest in the lands of Taylor, Richards & David, to Taylor, Richards & Burden, to secure them for a loan of over \$5,000, which was evidenced by a note. Matters being in this situation, and the Blanchard receipt being outstanding and a claim against the firm of Taylor, Richards & David, on the 21st day of January, 1861, George Burden submitted to E. C. David the following propositions: "I will give 480 acres of land in Butler county, or in adjacent counties equally satisfactory, to order of E. C. David, and his note for \$5,521.20, given to Taylor, Richards & Burden, if he will deliver to me, Wm. G. David and E. C. David's quitclaim to all their interest in lands, notes, accounts and other assets of Taylor, Richards & David, and assign to me E. Blanchard's receipt for \$1,200, dated September 1, 1855, and given by Taylor, Richards & David." E. C. David accepted this proposition. Pursuant to this arrangement the land was deeded, and the receipt was procured by E. C. David, and surrendered. The land deeded pursuant to this agreement was farm land, of the value of \$960. George Burden insists that the plaintiff should be charged upon the books of the firm with this sum. The plaintiff insists that he should not be charged at all; and, if charged in any sum, that he should not, in any event, be charged with more than half the amount. The plaintiff insists that this land was given for the quit-claim

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of E. C. David's interest in the assets of the firm of Taylor, Richards & David, and that the surrender of the Blanchard receipt was but a mere incident, or, at the most, but a small part of the consideration. The defendant insists that E. C. David had agreed to quit-claim his interest in the assets before, in consideration of the surrender of the note, and that the sole consideration for the conveyance of the 480 acres of land was the surrender of the Blanchard receipt. We do not deem it necessary to determine this question. Burden testified that he negotiated for the surrender of this receipt at the request of the plaintiff, and that the plaintiff agreed to become personally responsible to the firm of Richards & Burden for the amount paid therefor. This the plaintiff positively denied. As the burden of proof is, as to this fact, upon the defendant, we must hold that it is not proven.

The case then became simply the payment by Richards & Burden of a debt owing by the firm of Taylor, Richards & David. This, at the most, only made Richards & Burden a creditor of Taylor, Richards & David.

Richards & Burden, under the contract of May 8, 1860, the above agreement of January 21st, 1861, and the subsequent agreement of June 8, 1864, acquired the assets of the respective partners in the firm of Taylor, Richards & David. These assets, as we have already said, passed burdened with the liability of each partner for the debts of that firm. Richards & Burden having absorbed all the assets of the firm of Taylor, Richards & David, have become, to the extent of the value of these assets, liable for the debts of that firm. And, as it is conceded that Taylor, Richards & David had assets enough to pay all their debts, it follows that Richards & Burden are liable to the payment of this debt to Richards & Burden. This operates as a cancellation of the claim, and, in fact, the plaintiff testifies that it was agreed that this claim should be canceled. The disposition of this question by the referee is contained in the thirty-sixth finding. The referee found that the plaintiff should be charged with \$960 January 21, 1861. The court sustains the plaintiff's exception to this finding, and, in this regard, we think the action of the court was correct.

XV. As to the question of usury between the partners.

It was agreed in all the firms that each member should furnish all the money he could conveniently, to be invested in time locations, and that he should receive twenty per cent of the profits on the money so furnished, and that the balance of the profits, if any, should belong to the firm and be divided among the members equally. There was no loan to the firm, nor was there any agreement to pay the amount advanced with interest. The parties were engaged in the time entry business, so common in that day, and their agreement was made with the expectation that they would realize at least forty per cent profit upon the money invested. In passing upon the claim of Mr. Burden, we have already indicated our opinion that this arrangement was not usurious. The finding of the court and the referee upon this branch of the case is correct.

XVI. As to what credit plaintiff is entitled to from Richards & Burden on account of money paid by him for the Evans estate claim.

In 1861 the plaintiff, with his own money, bought, at a large discount, claims to the amount of about \$800, against the estate of John Evans, de-

ceased. Complaint being made of the plaintiff's engaging in speculation outside of the firm, he agreed to call the transaction a firm matter, and turned the claims purchased over to the firm. The firm collected nearly the face of these claims. The plaintiff insists that he should have credit for the amount paid for these claims. The only controversy is as to the amount of credit which plaintiff should receive. The referee found that plaintiff paid \$390 for the claims, and credited him with that amount. This action of the referee we approve.

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The firm of Richards & Burden did a life insurance business, Burden being the active agent, but accounting for the commissions to the firm. He procured a policy of insurance upon his own life, and from 1863 to 1867 paid the premiums out of the commissions earned. In the final decree Burden was charged with these premiums, amounting June 1st, 1876, to \$417.21. This was right. Burden had the sole benefit of the insurance, and it ought not to be paid for by the firm.

XVIII. As to whether Richards should be charged with the \$500 received by him on sale of the S. W. of S. E. and S. E. of S. W. 30, 95, 9. Also as to whether the credit of \$155 to Mrs. Burden on account of said land, appearing on the firm books, is a proper one.

I. On the 6th day of February, 1854, and before the formation of any of the partnerships referred to, B. B. Richards entered, in his own name, the above named land. On the 4th day of March, 1869, he sold it for \$500. Burden claims that Richards should account to the firm for the amount received, with interest. Both the referee and the court below disallowed this claim. In the journal of Taylor, Richards & Burden, under date of April 24, 1858, E. A. Holmes is credited as follows: "S. W. S. E. and S. E. S. W., 30, 95, 9, location with J. W. Taylor, \$155." On the opposite side of the journal, Taylor, Richards & Burden are charged with \$155, but the charge bears date April 20, 1858. The parties are unable to furnish any explanation of these entries, but Burden concludes from them that the land became the land of Taylor, Richards & Burden. Counsel for the defendant say: "We have no doubt that the land above described was entered in the name of Richards for Mrs. Burden, and with a part of the \$1,000 received by him on the first of February, 1854. On the 24th of April, 1858, Mrs. Burden was credited with the \$155, and the firm took the land." It may be true that the entries are susceptible of explanation upon this theory, but there is no evidence that the facts were such. And, considering the difference in the dates of the credit and debit, in connection with the other evidence in the case, we do not think that this theory must, of necessity, be adopted, nor, indeed, that it should be adopted. On the 2d of March, 1865, Burden charged B. B. Richards, in his private account on the ledger of Richards & Burden, with \$40.65, for taxes paid by the firm on this land. This is inconsistent with the position that the land became the property of Richards & Burden in 1858. Besides, B. B. Richards testifies positively that the land was entered by him, and was always his individual property. It is not incumbent upon us to explain these entries, since the parties who made them have not been able satisfactorily to do so. It is conceded that the land was

originally entered in the name of Richards, and Burden has not given any intelligible account of the manner in which it became the property of the firm. Under the evidence, we think the finding of the referee and of the court cannot be disturbed.

II. The referee included the above credit of \$155 in Mrs. Burden's account against the firm. The court caused this item to be stricken from her account. This credit, as we have seen, bears date April 24, 1858. As we understand the referee's report this sum is included in the general balance of \$10,320.47, carried to the credit of Mrs. Burden on the first day of January, 1859, and treated as account stated. It cannot be stricken from Mrs. Burden's account unless it is made satisfactorily to appear that it was entered up to her credit through mistake. The evidence does not satisfy us that any such mistake was made. We think the referee properly allows this item to remain to Mrs. Burden's credit.

XIX. As to whether Burden should account to the firm for the profits made by him on the SE. gr. of 14, 98, 11, Howard county.

Before coming to Iowa, the defendant, Geo. Burden, was a member of the firms of Burden, Woodruff & Co., and Burden, Baggage Co. One Samuel Fellows owed these firms \$345.41, which claim became the property of A. A. Woodruff. In June, 1860, Woodruff sent this claim to Burden for collection. In 1863 Burden took from Fellows a tax certificate on the above land in part payment of said debt. On the 19th of June, 1847, Burden bought the title of the original owner of said land, paying therefor, out of the firm funds, with which he was charged, \$450. In May, 1877, Burden settled this claim with Woodruff for \$75. November 12, 1868, Burden sold the land for \$1,500. The testimony shows that there was an express agreement between Richards & Burden, that neither should do any business properly belonging to the firm, such as buying or selling lands, for his individual interest. The court, in an interlocutory decree, ordered that Burden be charged with the profits realized upon the sale of this land, and that the referee take an account of, and credit him with, his expenses respecting them. Pursuant to this decree the referee took an account of expenses and charged the defendant with \$1,506.30, January 1, 1878. We have carefully examined all the evidence upon this question, and we think the action thereon is correct.

XX. As to whether Burden should be charged with Mitchell county orders.

The books of Richards & Burden show that they bought Mitchell county orders of the amount, including interest, of \$1,426.03. The books show of this amount \$646.81, in the hands of Roziene & Frisbie. The evidence shows that \$684.07 were sent to J. H. Brush, leaving \$95.15 unaccounted for. The plaintiff testified: "So far as I know, Mr. Burden took all of these orders, and he should account for the balance and accumulated interest." Mr. Burden admits that he used \$60.07 of these orders in paying taxes upon the Mitchell county lands, with which he should be charged at their market value of seventy-five cents on the dollar, if he is found to be the owner of the Mitchell county lands. He denies that he used any of the orders, or that he should be charged therefor, other than as above stated. The court in the interlocutory decree ordered that Burden be charged with the full amount of these orders. Pursuant to this decree, the

referee found that Burden should be charged with \$95.15, of the date of March 5, 1869. The only ground upon which this decree can be supported is that Burden was the book-keeper of the firm, and the orders are not accounted for. The orders were as much under the control of Richards as of Burden. The evidence shows that Richards sent the \$684.07 to Brush. The mere fact that the orders are not accounted for does not justify the charging of them to Burden. The defendant admits that he used \$60.07 of these orders in paying taxes, for the year 1869, on the Mitchell county lands. As the defendant was in the final account credited with all the taxes paid upon these lands, he should account, at their face value, for these warrants as of the date of the payment of the taxes of 1869, February 28, 1870. The defendant should be charged with \$60.07, with interest from February 28, 1870.

XXI. As to what Burden should be charged for the Chickasaw bonds or orders.

The firm of Richards & Burden had certain bonds, or volunteer orders, of Chickasaw county. The plaintiff claims that of these \$254.37 are unaccounted for, and that Burden should be charged with the whole amount and interest. Burden concedes that he used of these \$135.47, in payment of taxes on the Chickasaw county lands, and that he should be charged with this with interest from March 5, 1869, if he is allowed to hold the Chickasaw county lands. Under the interlocutory decree, Burden was charged with the whole \$254.37. There is no evidence that Burden used any of these orders except as above admitted. Burden has been credited with all the taxes paid upon the Chickasaw county lands, and hence should be charged with \$135.47, with interest from March 5, 1869.

XXII. As to the amount with which plaintiff should be charged for the Dubuque county warrants; also, as to whether any charge should be made on account of said warrants against George Burden.

I. The books of the firm show that on June 5th, 1869, they had on hand \$1,098.12, of Dubuque county warrants. The plaintiff admits that on June 3, 1869, the defendant handed him \$493.69 of these warrants, with a small amount of interest thereon, which he sold at par and appropriated, with the exception of \$77.13, used in paying taxes for the firm. On account of these warrants, the referee charged the plaintiff, as of June 5, 1869, with \$402.64. This action, we think, is correct.

II. The evidence shows that these warrants were all, June 5, 1869, in the custody of George Burden. The balance of the warrants have not in any manner been accounted for. The court in the interlocutory decree ordered that Burden be charged with all these orders. Under the evidence we think he was properly so charged. Pursuant to this decree the referee charged Burden, as of June 5, 1869, with \$491.11. We do not understand the plaintiff to make any objection to the manner in which the referee made up the account so as to reach this sum, but simply to insist that the charge, as made, pursuant to the interlocutory decree, should be retained. We think Burden was properly charged with this amount.

XXIII. As to what Mr. Burden should be charged for Dubuque county bonds, which he took of the firm.

At the time Burden took into his possession the assets of the firm in April, 1869, he took thirty-five Dubuque county bonds, of \$100 each, on one of which \$22 had been paid. These bonds bore interest at six per cent, and, at the time they were taken were worth seventy-eight cents on the dollar. Burden admits that he should be charged with these bonds at the rate of seventy-eight cents on the dollar. The plaintiff claims that Burden should be charged the full face value of the bonds. The referee charged Burden with the bonds at seventy-eight cents on the dollar. The court ordered that he be charged the full value of the bonds. The evidence shows that the bonds gradually appreciated in value from the time they were appropriated, and that, at the time the testimony in this case was taken, they were, and for some time had been, at par. Burden ought not to be allowed to profit out of this transaction, but he should account for what he realized from a sale of the bonds which he sold, and for the value of those which he retained. Burden testified that he sold six of these bonds in 1869, for eighty cents on the dollar, and that two were paid by the county, February 11, 1873, at the rate of ninety-five cents on the dollar. On the 24th of January, 1874, Burden testified that he still had in his possession \$2,478 of these bonds, on their face, not reckoning interest. The testimony does not fix the time of the sale of the six bonds in 1869. It is fair to assume the middle of the year as the date of the sale. We think Burden should be charged with six bonds at eighty cents on the dollar, with interest from July 1st, 1869, at seven per cent., with two bonds at ninety-five cents with interest from February 11, 1873, at seven per cent. The interest is placed at seven per cent because there was a written agreement between the parties that their respective accounts should bear interest at seven per cent. On the remainder of the bonds the defendant must be charged their par value, less \$22, with interest at six per cent from October 1, 1863, which, under the findings of the referee, we assume to be the date when the coupons were payable.

XXIV. As to amount of rent Richards should pay for house on Bluff street.

Richards occupied the "Attix House" on Bluff street, owned by the firm. It is conceded that he is chargeable with rent, the only question being at what rate and for what time. The referee found that Richards should pay at the rate \$300 per annum, from April 1, 1859, to November 1, 1865, when the parties opened their joint house account, and from June 1, 1866, when such account ceased, to May 1, 1868, when he found plaintiff's liability terminated. The court approved this finding, and, from an examination of all the evidence bearing on the question, we think the finding correct.

XXV.

During the existence of the partnership Richards, was in the legislature four sessions. It is insisted that he should account for his per diem for these sessions. The evidence shows that he did allow \$110 of his compensation to be used for house expenses during the spring of 1866. The evidence tends to show that this \$110 was all that Richards saved out of his compen-

sation as a member of the legislature, and that in the session of 1868 he spent more than he received. The referee and the court below correctly disallowed this claim.

XXVI. As to what Burden should be reimbursed on account of Wm. Burden, Sr.

On the books of Richards & Burden, William Burden, Sr., is debited with \$225.95. The plaintiff claims that George Burden advanced this sum for his own convenience, that it was not a partnership transaction, and that George Burden should account to the firm for that amount.

Upon the contrary it appears that on the books of Taylor, Richards & Burden there was a credit in favor of William Burden, Sr., for \$435.87. Burden claims that the debit of \$225.95 was a payment of this credit, and that he paid the balance due William Burden, Sr., and should have a credit therefor. On account of this claim the referee and the court allowed the defendant, George Burden, a credit, as of date of payment, July 1, 1867 for \$338. From an examination of all the evidence we think defendant is entitled to the balance between the credit, \$435.87, and the debit, \$225.95, with interest from January 1, 1859, to July 1, 1866, at six per cent. After the date of payment, the amount paid became a credit due George Burden, and under the agreement between himself and Richards he is entitled to seven per cent interest thereon.

XXVII. As to whether Mrs. Burden is liable on the Susan Burden account.

On the ledger of Richards & Burden are debit items, in the handwriting of George Burden, against Susan Burden, amounting to \$128. Susan Burden is the wife of William Burden, Jr., and sister-in-law of George Burden. The plaintiff testifies that in the usual course of business with the firm he knows of no transactions with Susan Burden; and that these items of cash were advanced to her by George Burden for his own convenience, without the knowledge or consent of plaintiff. George Burden testifies that the balance of \$128, against Susan Burden, is made up of sundry cash items, but he does not testify that they were advanced in the prosecution of the ordinary partnership business, or that they grew out of a firm transaction. He simply says that he should not be charged with these items, and that they are incorporated into the account against William Burden, Jr., and embraced in the balance of \$244.19 against him. We think from all the evidence that this account was not incorporated into the balance against William Burden, Jr. The referee charged the defendant with the various items of this account, with interest at seven per cent., amounting, June 1, 1876, to \$200.64. This action of the referee we approve.

XXVIII. As to whether Burden should be charged anything, and if so, what, on account of the Belcher mortgage, and Baird lot matter.

This matter is, under the evidence, exceedingly complicated. It is very difficult to reach a conclusion which is satisfactory. So far as we can gather the facts from the indefinite and unsatisfactory evidence, they are as follows: Belcher & Chapman were doing business in making soda water and, in 1857, they executed a mortgage upon certain property connected with the soda

business, to Taylor, Richards & Burden, to secure the sum of \$650. Afterward J. W. Ware, a brother-in-law of George Burden, became connected with, Belcher & Chapman, and they executed a mortgage to George Burden for the expressed consideration of \$3,406, on everything connected with the soda water business, including the property before mortgaged to Taylor, Richards & Burden. The plaintiff asserts another claim of \$800 was secured by a mortgage upon the property connected with the soda water business, to Taylor, Richards & Burden; also, that another note of \$114.75 was secured by the mortgage first named. Through the procurement of George Burden, Belcher, Chapman & Ware sold out their property mortgaged as aforesaid, to one W. R. Baird, who executed a mortgage direct to George Burden upon lots 6, 7, and 8 in Baird's addition, subject to a mortgage of \$500 to one Cain, to secure the purchase money. Burden afterward disposed of the mortgaged property. The plaintiff claims as a result of this transaction, first, that Burden, having realized the value of the mortgaged property, must account for sufficient to satisfy the prior incumbrance to Taylor, Richards & Burden, and that he has not done so; second, that Burden made a profit out of the sale of the Baird lots and must account to the firm therefor. The referee originally disallowed both claims. Under the interlocutory decree, the referee charged the defendant with two items, one of \$114.75, and one of \$51.16, amounting June 1, 1876, to \$376.21, as due Taylor, Richards & Burden, on the prior mortgage, and not paid. Entries upon the ledger of Richards & Burden, in the hand writing of Burden, seem to us to justify this charge.

As to the profits upon the sale of the Baird lots, Burden testifies that he made none, and we cannot find from the evidence that he did. As to this branch of the case we approve the action of the court and of the referee.

XXIX. As to whether the McVey purchase is a firm transaction.

Richards & Burden were agents for the sale of 320 acres of land belonging to the McVey estate, the lands having been put into their hands by Cook & Welling, of Des Moines. They negotiated a sale of these lands, which failed because of a defect in the title. Richards & Burden themselves made an offer for the lands which was not accepted. For nearly a year the matter rested without any correspondence between the parties, until just prior to the commencement of this suit, when Cook wrote a letter to plaintiff asking him to renew his efforts to sell the land. On the 15th of September, 1869, three days before the commencement of this suit, the plaintiff wrote Cook & Welling informing them that he and Burden would do no more business together, and asking that any further correspondence be directed to him individually.

October 4, 1869, Richards reported an offer for the land, six dollars per acre, which was accepted on the 16th. On the 28th of the same month Richards reported that, because of defect as to title, the party was disposed to back out, and that, if he did, he, Richards, would himself take the land. On December 8, 1869, the land was deeded to Richards. The defendant insists that the transaction should be treated as a purchase on behalf of the firm, and that Richards should account to the firm for the profits thereof.

The referee and the court disallowed the claim, and, from a consideration of all the evidence, we think their action is right.

XXX. As to the charge to be made on account of firm land in Butler county, appropriated respectively by plaintiff and the defendant, George Burden.

The plaintiff, on the twelfth day of April, 1865, by consent of the defendant, George Burden, appropriated to his own uses 242.26 acres of land in Butler county, which was entered to the debit of plaintiff, but the price was not extended.

On the twenty-fourth of February, 1866, Mr. Burden, by consent, appropriated to his own use 160 acres of land in Butler county which was entered to his debit, but the price was not extended. The plaintiff claims that the agreement was that each party should be charged what the lands were fairly worth.

The defendant, Burden, claims that it was agreed that 160 acres of land taken by plaintiff should be offset with the 160 acres taken by Burden, without regard to value, and that plaintiff should be charged with value of the remaining 82.26 acres. The referee found the agreement to be as claimed by the plaintiff, and charged plaintiff \$2 per acre, April 12, 1865, and the defendant \$4.50 per acre, February 24, 1866.

The agreement, as claimed by plaintiff, is in accordance with what would be regarded as reasonable, in a business transaction, and is just what the law would imply in the absence of any agreement. The burden of establishing an agreement such as the defendant claims, exceptional in its character, and such as will not be inferred, is upon the defendant. We think the evidence supports the finding of the referee, or at least that the defendant has not established by a preponderance of testimony the agreement by him claimed.

XXXI. As to whether plaintiff should be charged with the balance due Richards & Burden from Mrs. Hervey.

The defendant, Burden, testifies that plaintiff should be charged with all accounts due from his sister, Mrs. Hervey, because all money was advanced, and all indebtedness was incurred, upon the agreement of plaintiff to see it paid.

The plaintiff positively denies that he ever made such agreement. The burden of proof is upon the defendant. He fails to establish his claim by a preponderance of testimony.

XXXII. As to whether the plaintiff should be disallowed interest on certain erroneous credits.

Certain erroneous credits appear on the books in favor of plaintiff, amounting to \$1,006.75. In 1863 these credits were charged back to the plaintiff. To the end that plaintiff might not be allowed interest on these items, the referee in making up the account omitted both the credits and debits. This is as the defendant insists the account should be stated, and of this the plaintiff makes no complaint.

XXXIII. As to the amount of the account of R. A. Babbage against Richards & Burden assigned to George Burden.

R. A. Babbage assigned to the defendant, George Burden, his credit standing on the books of Richards & Burden. The only question of controversy growing out of this item is as to whether Babbage, at the time of this assign-

ment, was in fact a creditor of the firm of Richards & Burden. The referee found that he was, and that, on account thereof, there should be credited to George Burden, as of October 1, 1870, \$326.22. This finding was approved by the court below. The evidence is conflicting, and leaves this question somewhat in doubt. We have concluded, after a careful examination of all the evidence bearing upon this question, that the finding of the referee thereon should not be disturbed.

XXXIV. As to the ownership and amount of the balance due from Richards & Burden to Burden, Babbage & Co.

The defendant, George Burden, claims that he is the owner of the balance due Burden, Babbage & Co., from the firm of Richards & Burden. We think the evidence supports this claim.

The referee found there was due George Burden, on December 12, 1868, on account of this claim, \$2,092.04. The only item entering into this account, about which there is any dispute, is as to the value of a house and lot conveyed by Burden, Babbage & Co., in settlement of a debt due from Taylor, Richards & Burden to the estate of J. J. Duvitt. The referee found the value of this house and lot to be \$400. A preponderance of the evidence, in our opinion, supports this finding.

XXXV. As to what amount should be charged Burden on account of money drawn by him from firm deposits at Merchants' National Bank.

Richards & Burden, in their account with the Merchants' National Bank, had a balance to their credit, in August, 1869, of \$901.76. The plaintiff testifies that George Burden drew out all of this sum. The checks drawn upon this sum are as follows: \$126, \$2.25, \$150, \$300, \$3.50, and \$320, amounting to \$901.75. The defendant admits that he drew the \$150 and the \$300, and likely the \$320. He will not deny that he drew the other sums. He concedes that he is properly chargeable with the \$150. He claims that he used the \$300 in paying taxes upon the lands of the firm in Winona. But we think from all the evidence that, if he did, the amount was afterward refunded to him by the receiver. He further claims that the \$320 is included in a charge to him on the firm books of \$333.75. We cannot find from the evidence that such is the fact. He further claims that he did not use any of the money for his personal benefit. If he did not, it is probable that he has credit for all the sums on the firm books.

The referee charged the defendant with the whole of this sum. We find nothing in the evidence which justifies us in disturbing this finding.

XXXVI. As to the interest chargeable on the proceeds of the sale to Babbage.

On the 23rd day of July, 1869, the defendant, George Burden, conveyed a large quantity of firm land, the title to which was in his own name, to his brother-in-law, Richard Babbage, for the consideration of \$17,936.58, and received therefor a check for \$936.58 and two notes, one for \$8,000, payable in one year, and one for \$9,000, payable in two years, both drawing interest at the rate of ten per cent.

On the 25th day of July, 1871, the plaintiff testified as follows: "As I do not wish to delay the settlement of this case, though I believe the same to be

fraudulent, I elect as an alternative, better than delay or uncertainty, to affirm that sale, and hold defendant, George Burden, responsible for the purchase price of that property, about \$18,000, and ten per cent interest thereon in accordance with the terms of sale." The referee found that the sale was fraudulent, but that, as the plaintiff had ratified the sale, Burden should be charged with the consideration received, \$17,986.58, with interest at seven per cent from July 23, 1869.

The court modified this finding, so far as to charge the defendant with interest at the rate of ten per cent on each of the notes until they mature. The correctness of this modification is the only question which is presented on this branch of the case.

We think, though not without doubt, that this action of the court was correct. As the sale was fraudulent on the part of Burden, he ought not to be allowed to derive any advantage therefrom, at the expense of his copartner, the plaintiff. Both notes were due at the time the plaintiff elected to affirm the sale. Burden testifies that Richard Babbage was solvent. In legal contemplation, then, Burden received the amounts of these notes with interest, at maturity, and for that sum it is proper that he should account to the firm.

XXXVII. As to the note for \$460.30, and the amount due Mrs. Burden thereon.

Mrs. Burden held the note of Richards & Burden for \$460.30, of date January 8, 1863, bearing interest at ten per cent. This note amounted, July 1, 1871, to \$1,030.81, with which amount the referee credited her as of that date. The plaintiff testified that Mrs. Burden should receive credit for this note and interest.

On the 1st of April, 1869, the defendant George Burden, took from the firm safe a large amount of notes and turned them over to Mrs. Burden, to be applied toward the satisfaction of her claim against the firm. On these notes Mrs. Burden collected a little less than \$12,000, with all of which as of date of collection, she is charged by the referee. It is now insisted, on behalf of plaintiff, that the first money collected upon these notes should be applied in satisfaction of the above mentioned note, rather than upon the open account which bears, as we have seen, but six per cent interest. We are of opinion, however, that equity and exact justice between these parties requires that the collections should be applied to the account which is of much older date than the note.

It is probable that the plaintiff would have been entitled to direct the application of a part of these proceeds to the payment of this note, if he had done so seasonably. But it does not appear that he ever did so until the argument of the case. When his testimony was taken he stated that Mrs. Burden should have credit for the amount of the note and interest, which must be regarded as an assent that the collections referred to should be applied otherwise than upon the note.

XXXVIII. As to an erroneous charge to Mrs. Burden of \$600, in her account with the firm.

It is conceded that this charge was erroneous. The referee rejected it in making up the final account.

XXXIX. As to sale of safe to plaintiff.

The safe of the firm of Richards & Burden was sold to plaintiff, Dec. 15, 1871, for \$345. It is conceded that the plaintiff was properly charged with the amount.

XL. As to money expended by Mr. Burden to perfect title to SE. of NW., 6, 96, 20.

The court and the referee allowed the defendant, George Burden, what he claimed as to this item, and with this action the plaintiff is content.

XLI. As to whether George Burden should be credited, in his account with Richards & Burden, with various sums not entered on the firm books.

George Burden claims that he should have credit with various sums not entered on the firm books. The referee allowed all these items except one of \$300. The court struck out of the credit to Burden and the debit to Richards, another item of \$50. These two items constitute the only grounds of dispute on this branch of the case.

1. The item of \$300 is cash paid for taxes in Winona. We have determined in division XXV of this opinion that this \$300 was refunded to Burden by the receiver. It follows that he should not have credit for that sum.

2. The evidence shows that the \$50 item was paid by Burden, in 1872, to perfect the title to a part of the land which he sold to Richard Babbage in July, 1869. For this reason it was stricken out of the defendant's account.

It is claimed by the defendant that the land, for the perfection of the title to which the \$50 was paid, was acquired from Richards under the contract of May 8, 1850, and that he was under obligation, under the contract, to make good the title. We are unable to find, from the evidence referred to by the defendant, that the land was embraced in this contract. We think the action of the court upon this branch of the case is correct.

XLII. As to money paid by Burden for taxes and tax certificates on certain lands in Cerro Gordo county.

The referee and the court below allowed Burden all he claimed under this head, \$688.35, as of July 1, 1876. Of this the plaintiff does not complain.

XLIII. As to block 9, Hamilton's addition, and Grout House in Winona, Minnesota.

The firm of Richards & Burden sold block 9, Hamilton's addition to Winona, and the Grout House in the same town, and received the proceeds of the sales. At the time of the sales Burden individually owned one third of the Grout House and one fifth of block 9. For these interests he was credited by the court below, as of Jan. 1, 1878, with \$908.39. This action is satisfactory to both parties.

XLIV. As to the notes turned out by Mr. Burden to Mrs. Burden, and by her, during the progress of the suit, returned to the receiver.

On the 25th day of May, 1869, the defendant, George Burden, assuming to act on behalf of the firm of Richards & Burden, entered into a settlement with Mrs. Burden, and evidenced it by a written agreement. In this agreement it was stipulated that, after deducting from the credits of Mrs. Burden

the sum of \$9,250.38, on account of the interest agreed to be conveyed to her in the Chickasaw and Mitchell county lands, there remained due her the sum of \$38,347.49. For this sum he executed in the firm name three promissory notes, each for the sum of \$12,782.49, due in thirty, sixty, and ninety days, with interest at six per cent. In part payment of the sum acknowledged to be due to Mrs. Burden, Mr. Burden turned over to her a large amount of firm notes. On these Mrs. Burden collected a little less than \$12,000, and she was properly charged with the sum collected in stating the account by the referee. On the 15th day of January, 1874, Mrs. Burden filed a supplemental answer and cross bill, in which she states that all the notes and bills receivable turned out to her, and uncollected, have been delivered to the receiver, and asks that the amount due her before said notes and bills receivable were turned out to her may be ascertained.

With reference to this branch of the case, the referee found as follows: "This was no settlement. It was a grand 'coup,' was unauthorized, without the knowledge or approval of plaintiff, and all this was well known to defendant, E. A. Burden. It was made when both defendants knew that the amount due her was in dispute, and was made on a basis which both defendants knew was not, and would not, be approved by plaintiff.

"Defendant, E. Burden must be charged with all moneys paid to her on such notes. Pending this action she has, by pleadings filed, accounted for all collections made on such notes, and turned over the balance to the receiver of the firm." The defendants now claim nothing under the settlement. Mrs. Burden was permitted to return to the receiver the uncollected notes, and she was finally charged with only amounts collected. Of this the plaintiff complains. The plaintiff insists that the defendants should be charged, as for a conversion, with the face value of all the notes originally turned out to Mrs. Burden. This action was commenced on the 18th day of September, 1869. In the petition then filed the plaintiff alleges that the defendant, George Burden, has delivered the firm property to the defendant, Eliza A. Burden, and asks that she be compelled to account for the firm property in her hands; that a receiver be appointed; and that the defendants be enjoined from interfering with, or disposing of any of, the partnership property under their control, and that they be compelled to surrender the same to the receiver. Pursuant to this petition, on the 18th day of September, 1869, a receiver was appointed and an injunction was granted as prayed. The defendants filed a motion to dissolve this injunction, which the court on the 4th day of January, 1873, overruled. The plaintiff might, perhaps, have proceeded against the defendants for a conversion of these notes. But it is evident from the petition, and from the procuring of an injunction restraining the defendants from disposing of this property, that he elected still to treat the property as firm property, and to pursue the property itself. In view of the claim made in the petition, and of the fact that the evidence does not show a depreciation of this property in consequence of its being in the hands of the defendants, we think there was no error in permitting a return of this property to the receiver.

XLV. As to the Mitchell and Chickasaw county lands sold by Burden.

The defendant, George Burden, sold a quantity of the land in Mitchell and Chickasaw counties, embraced in the contract of January 9, 1869, which we

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hold cannot be enforced. The referee charged Burden with the sum for which each piece of land sold, with interest thereon at seven per cent from the date of the sale. The court, in the interlocutory decree ordered that Burden be charged with all moneys received on these sales, and that he turn over to the receiver all notes, evidences of indebtedness, contracts, or mortgages in his possession.

The defendant took notes and securities upon the sales made, drawing ten per cent interest. The effect of the decree of the court is to allow the firm the benefit of this interest, instead of simply seven per cent upon the amount of the sales. We think the action of the court in this regard is correct.

XLVI. As to costs of suit, Griffith v. Richards & Burden.

J. M. Griffith deposited with the firm of Richards & Burden, to be sold or accounted for, one Minnesota State bond, and obtained the receipt of the firm therefor. When Burden removed the firm assets in April, 1869, he took the bond. Griffith not being able to obtain the bond, sued Richards & Burden therefor, and recovered judgment. The costs of this suit were paid by the receiver, and the court directed in the interlocutory decree, that they be charged to the defendant, George Burden. Accordingly the referee reported the costs in that suit at \$37.65, amounting June 1, 1876, to \$46.36, with which Burden was charged. These costs were all incurred through the individual act of Burden in taking this bond into his custody and refusing to surrender it. We think he was properly charged with the costs of the suit rendered necessary by his wrongful act.

We have gone over this entire case and considered all the points discussed by counsel. In all respects, except as indicated in the foregoing opinion, the action of the referee, and of the court is approved and affirmed. Our determination, allowing the plaintiff a credit for the uncles and aunts accounts, reducing the credit to which the plaintiff is entitled for household expenses, and reducing the interest to be allowed Mrs. Burden on her account, necessitates an entire restatement of the account.

The cause is again referred to D. C. Cram, Esq., to state the account between the parties in accord with the views of this opinion, and make report of his action to this court. Upon the filing of the referee's report, final decree will be entered in this court. Or the parties, if they so elect, may have the cause remanded to the court below for the appointment of a referee, statement of account, and final decree. The costs of this court will be taxed, one half to the plaintiff and one half to the defendants.

MODIFIED AND AFFIRMED.

Adams, J., having been of counsel, took no part in the determination of this case.

ON REHEARING.

SEEVERS, CH. J.—Upon the petition of the defendant, a rehearing was granted as to several paragraphs contained in the foregoing opinion. As to all of which, except the seventh, the opinion is in all respect adhered to. The questions determined involve propositions of fact only, therefore a more extended discussion of the evidence is deemed unnecessary. As to the seventh paragraph, the court is equally divided. This result is caused by the fact

that Adams J. has been of counsel, and therefore takes no part in the case. The question now arises, what further order can or should be made. This proposition has been fully argued by counsel, and, in relation thereto, we desire to say: Under the statute, a petition for a rehearing may be filed which stands as the argument in its support. If the court think such argument requires a reply it shall so indicate to the other party and he may reply thereto, within such time as the court may allow. The decision may be suspended until the questions presented in the petition for a rehearing are determined. Code, section 3201, 3202. The rules of this court require the petition to be filed within sixty days after the decision. During such time this court retains jurisdiction of the case for all the purposes of a rehearing as though no opinion had been filed. *Mc Kinley v. C. & N. W. R. R. Co.*, 44 Iowa, 314.

When a reply is ordered the court has of course determined to re-consider the questions as to which a rehearing is asked. In the present case, as no question of law is involved, the court again in the light of the additional arguments has examined the evidence as an original question. The opinion heretofore filed having no effect as to the determination to be made. When the petition was presented, a rehearing was in fact ordered. But this is not regarded as material, for in such a case, or when a reply is directed to be made, the result is the same, and that is, a retrial or reconsideration of the matters as to which a rehearing is asked is the essential thing the court is called on to do. Such reconsideration of the evidence bearing on the question determined in the seventh paragraph of the foregoing opinion has been made and, two members of the court adhere thereto, and an equal number say the conclusion reached is not in accord with the evidence. If this result had been reached when the case was first before the court, the judgment of the District Court would have been affirmed by operation of law. Code, section 140. As the court is unable upon a reconsideration of the evidence, which is enjoined by law, to say whether the foregoing opinion is right or wrong, the result is, and must be, that it does not now embody the views of a majority of the court. That it did so at one time must be conceded, but this is immaterial, because what is the final decisions of the court can only be known after the final submission of the cause, and after the decision has been made upon such submission. The final submission known to the law of this State is that upon rehearing, when the submission is made, the pivotal question is not what has been theretofore decided, but what decision shall be made.

Suppose that upon a rehearing of an opinion reversing the judgment of the court below in an action at law, this court should be equally divided in opinion. If this division should result in an adherence to the original opinion, and a remanding of the cause, the court below might adhere to its original view, which, upon appeal, would be affirmed by a divided court, so that the same judgment would be both reversed and affirmed. The same result would follow under the same circumstances in an equity case. This being so, it seems to us a different rule than the one adopted would lead to absurd results. It can make no difference where the final decree is entered in an equity cause. The rule should be the same whether entered in this or the court below.

We are therefore of opinion that the seventh paragraph of the foregoing

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opinion must be stricken out, because it does not embody the views of a majority of the court. The result is, the judgment of the District Court in relation to the subject matter thereof must stand affirmed by operation of law. As the defendant consents thereto, the tenth paragraph of the foregoing opinion will also be stricken out, and the judgment of the District Court in relation to the subject matter thereof will be affirmed, unless the plaintiff objects thereto. A decree will be prepared in accordance with this opinion.

BECK, J., *Dissenting*.—I. This case was tried before four justices of this court, one, Mr. Justice Adams, having been of counsel in the court below, has taken no part in its consideration and decision. The four justices concurred in an opinion announcing a decision which modified the judgment of the court below. A rehearing was allowed and the case was reargued. There was no order suspending the judgment. This, it is presumed, was not considered necessary, as the decision required the preparation of a decree, and the cause was sent back to the same referee who first heard the case. Upon the rehearing two of the justices adhere to the opinion filed, and two think that it ought to be modified as to one or two items allowed to plaintiff by the opinion. It thus happens that the justices qualified to act in the case are, upon the rehearing, equally divided in opinion upon these items. It should be noted that the petition for rehearing does not complain of all the conclusions in the opinion, but only of those upon a few points, and a rehearing is asked upon no other points of the case. We are to determine what is the effect of an equal division in the opinion of the judges upon the disputed points which were reargued.

II. The filing of the opinion was the announcement of the decision of the court. Code, section 3205. The case was then decided. The points determined were expressed in the opinion. The decree is the expression of the decision in another form. I conclude that there was a decision in the case at the time the petition of rehearing was filed.

III. The granting of the rehearing did not vacate, annul, or set aside the decision made when the petition was filed. The statute provides that upon the filing of the petition for rehearing the decision shall be suspended upon the order of the court, or one of the judges. Code, § 3201.

We must inquire what is meant by the term "to suspend" the decision. It does not mean to annul, set aside or vacate—to suspend means, "to cause to cease for a time, to hinder from proceeding, to interrupt, to delay, to stay." Webster. It is used in this sense in the statute, which expresses the thought that the operation of the decision is delayed. Section 3202 provides that "with a view to a rehearing, the court may extend the suspension of proceedings, yet farther if need be." The "suspension of proceedings" here provided for is the delay or stay thereof. This suspension is ordered "with a view to a rehearing."

The word "view" in this connection means "that which is looked toward, or kept in sight, as object, aim, intention, purpose, design." Webster. The clause of the section just quoted therefore means "for the purpose of rehearing, the operation of the judgment is delayed."

Now the setting aside or vacating of the decision is not provided for or contemplated when a rehearing is granted; the statute provides for "suspen-

sion of proceedings," that is, delay of operation of the decision. This is the plain and undisputed meaning of the statute, and *there is no provision found anywhere authorizing or permitting the court to set aside the decision when a rehearing is allowed.*

I have considered what the court may do by proper order, but in this case it has made no such order. But upon that fact I place no reliance, and I may concede that whatever the court could have done was done, namely, the operation of the decision was suspended pending the rehearing.

IV. When the rehearing is allowed the court is required to determine whether the opinion will be adhered to, or whether a different decision will be announced in a new opinion, which will operate to set aside the first decision. This of course involves a reconsideration of the whole case. Upon the granting of the rehearing, we were required, then, to determine whether the decision should be set aside and a different decision rendered. I have, I think, showed clearly that the granting of the rehearing did not set aside the decision. Until set aside that decision must stand. To set aside the decision, a majority of the justices must concur, just as in all other orders and decisions. If the judges authorized to act are equally divided, the decision must stand. I can discover no way of escape from this conclusion.

V. The foregoing views are in accord with our uniform practice. We never enter new judgments in rehearsings when the opinions are adhered to; our order is simply, "The opinion is adhered to."

If the decision is set aside by the granting of a rehearing, of course a new judgment would be entered. We have then the case of a subsisting valid decision; an equal division of the opinions of the judges cannot set it aside.

VI. But, it may be asked, when will the suspension of the operation of the decision terminate. I reply when the proceeding upon rehearing terminates. This proceeding terminates when the court reaches the conclusion that the decision cannot be set aside. This decision is reached when it is discovered that a majority of the court does not concur therein. So when we discover that the judges are equally divided upon the questions submitted on the rehearing, the suspension of the decision is removed and the decision stands and must be enforced.

VII. Consideration of the argument presented in the last paragraph but one of the foregoing opinion, based upon the case of an equal division of the judges of this court in a law action, is demanded for the reason that it has a controlling influence upon the mind of at least one of my brothers. The argument supposes a case of an equal division of opinion upon a rehearing in a law case, which results in reversing or remanding a case. It is said the court below "*might* adhere to its original view." I would change the expression and say the court below "*ought* to adhere to its original view, unless new light was shed upon the case by the new trial." The equal division in this court, in the supposed case, takes from the decision all authority as a precedent. The judgment of reversal would require a new trial, but the decision of the courts being based upon an equal division could be no guide to the court below, which would be left free to select its own course. Upon another appeal in the case, if the court remained equally divided, the judgment of the court below would be affirmed.

The opinion of the majority contains the statement that in this court "the

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same judgment would be both reversed and affirmed." It cannot be true that the same judgment can be twice appealed from, or can be both reversed and affirmed in this court. The first judgment being reversed was set aside and ceased to be of force. Thereupon the cause was remanded and another trial was had, and *another* judgment was rendered, which, in its turn, was appealed from and was here affirmed. So it is impossible that the "same judgment would be both reversed and affirmed. It is true that in the same case there were two successive judgments rendered by the court below, one of them was reversed, and the other affirmed, in this court, a thing of not unusual occurrence. This result, to my mind gives no support to the position that this court, upon an equal division in the opinion of the judges, may set aside a decision rendered by the unanimous concurrence of all the judges qualified to sit in the case. I fail to discover any "absurd results in the supposed case which is made the foundation of an argument of controlling weight with the majority of the court. The way of difficulty and obscurity, it seems to me, has been chosen in the foregoing opinion of the majority. If we should decline to set aside a decision of this court, except upon the concurring opinion of a majority of the judges qualified to sit in this case, one road to such a conclusion would be to my mind plain and clear. I prefer to pursue it and therefore dissent from the foregoing opinion of the majority.

LANDERS & SON v. BOYD ET AL.

APPEAL TO THE SUPREME COURT: AMOUNT LESS THAN \$100: QUESTIONS OF LAW ONLY TO BE CERTIFIED.

Appeal from Winneshiek Circuit Court.

WEDNESDAY, JUNE 14.

ACTION upon an account for merchandise sold and delivered. General denial and payment pleaded by defendants. Trial by jury, and judgment for defendants; plaintiffs appeal.

L. Bullis, for appellants.

Willett & Willett, for appellees.

SEEVERS, CH. J.—The amount involved being less than \$100, certain questions have been certified upon which it is said to be desirable to have the opinion of the Supreme Court.

The first and second questions are as follows: "Does the evidence legally establish "an express contract of payment," and "does the evidence legally establish a release of the defendant from payment." Neither of these questions presents for determination a question of law, and it is only such a

question that can be certified for the opinion of the court when the amount involved is less than \$100. Code, § 3173.

The remaining question certified is as follows: "Was the instructions of the court to the jury authorized for the purpose of ascertaining an express contract, which instructions are as follows: "And the mutual understanding of the parties may be found by you, from the treatment of the transaction by the parties at the time of it and afterwards."

Whether this instruction is correct depends upon the evidence, and we have great difficulty in ascertaining what is the precise question we are asked to determine. As we understand, the argument of counsel for the appellant is mainly directed to the point that the evidence does not establish an express contract, and, to sustain the defense, it was essential such a contract should be established. But no such questions are submitted to us.

AFFIRMED.

STATE V. KENNEDY.

INSTRUCTIONS: NO ERROR.

Appeal from Henry District Court.

FRIDAY, SEPTEMBER 22.

L. G. & L. A. Palmer, for appellant.

Smith McPherson, Attorney-general, for the State.

DAY, J.—The defendant was indicted for keeping a nuisance, under section 4091 of the Code. He was tried by a jury, found guilty, and fined in the sum of \$200. From this judgment the defendant appeals. The cause is submitted without abstract or argument for the defendant. The transcript does not contain the evidence. We have examined the instructions, and we find them correct. The record discloses no error.

AFFIRMED.

DICKERMAN V. FARRELL.

FRAUDULENT CONVEYANCE FROM FATHER TO SON: EVIDENCE CONSIDERED, AND CONVEYANCE SET ASIDE.

Appeal from Winneshiek Circuit Court.

THURSDAY, OCTOBER 5.

ACTION in chancery to set aside a deed of certain lands on the ground that it was executed with the fraudulent purpose of defeating the collection of a

judgment recovered by plaintiff against the grantor, Michael Farrell. There was a decree granting the relief prayed for; defendant appeals.

W. E. Akers, for appellant.

L. Bullis, for appellee.

BECK, J.—The evidence conclusively shows the debt and judgment in favor of plaintiff, and the insolvency of Michael Farrell, and the conveyance to his son William, the other defendant, of the land, without the payment of any money. The son assumed to pay certain mortgages upon the land, and gave his note to his father for \$1,050, due in about six years. This note the father sent to another son, who agreed to pay \$600 for it, and did pay the father \$60 thereon. The father and son both testify that the first owed the last about \$350 at the time of the sale, but this sum was not deducted from the price of the farm; it was secured by a mortgage upon the father's personal property. The son also acquired by purchase about all the personal property of the father that was subject to execution. Indeed, after the transaction with the son, the father became invulnerable to attack by execution, if the transaction is held valid. The son is unmarried, about twenty-five years of age, and most of the time lives at home. The father rented the farm from him, and they both seem to look after affairs connected with the farming and the business of the farm. The mother refused to sign the deed and claims her homestead rights. This, the father and son say, was considered in arranging for the payment of the farm. These and other facts lead us to the conclusion that, on the part of the father, the sale was made to defeat his creditors, and especially plaintiffs.

The son testifies that he did not know his father was indebted to plaintiff, or owed any other debts besides those the son had assumed to pay. Now these debts were provided for by the son assuming to pay them. It is very plain that the father's conduct in putting out of his hands all of his property subject to execution, was sufficient to inform the son that there were other debts against which the father prepared protection. Their intimate relations, living together as one family, would render it impossible for the son to remain ignorant of his father's true financial condition. We are satisfied he knew of plaintiff's claim, and well knew of his father's purpose to defeat it, and aided him therein.

Other facts of the case need not be recited. We reach the satisfactory conclusion that the decree of the Circuit Court is correct.

AFFIRMED.

HEMINGER v. ROBB.**EVIDENCE CONFLICTING: JUDGMENT AFFIRMED.***Appeal from Van Buren District Court.***WEDNESDAY, OCTOBER 4.**

ACTION upon a promissory note. The defendant admitted the execution of the note, and pleaded a counter-claim. There was a trial without a jury, and judgment was rendered for the plaintiff for the amount of the note. The defendant appeals.

*Lea & Wherry, for appellant.**Work & Brown, for appellee.*

ADAMS, J.—The defendant claims that the judgment is not supported by the evidence. But the evidence is not without conflict. It is voluminous and complicated, and it may be that the court erred in the conclusion reached; but such error, if any, it is beyond our power to correct, and the judgment must be

AFFIRMED.

JOYCE v. MILLER BROS.**ATTACHMENT OF EXEMPT PROPERTY: PRACTICE: BURDEN OF PROOF: EVIDENCE.***Appeal from Palo Alto Circuit Court.*

THE plaintiff sued out an attachment, and caused certain property to be attached which the court released or discharged from the attachment, and the plaintiff appeals.

*P. O. Cassidy and T. W. Harrison, for appellant**C. E. Cohoon and Geo. E. Clark, for appellee.*

SEEVERS, CH. J.—I. The plaintiff caused to be attached two horses as the property of the defendants. The defendant, John I. Miller, filed a motion under Code § 3018, to discharge the attached property because he was the head of a family, and the horses attached belonged to him, and therewith he

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habitually earned his living, and they were therefore exempt from execution. The plaintiff filed an answer to the motion, setting up that the claimant did not claim the property as exempt from execution at the time the levy was made, but on the contrary, voluntarily surrendered it to the sheriff.

On motion the answer was stricken from the files on the ground it was unknown to the law in a case of this kind. Of this ruling the plaintiff complains. We think it correct, because no pleading is required or allowed controverting the motion. If, however, there was error in striking the answer from the files, it was not prejudicial, because evidence was introduced tending to show the matter alleged therein, and no complaint is made that any evidence in relation to the matter pleaded in the answer was excluded.

Counsel, seem to suppose because the matter pleaded by the plaintiff was in the nature of an estoppel, therefore it was essential that the same should be pleaded. But this rule cannot apply in a case where pleadings are not allowed or required.

II. Evidence was introduced by both parties upon the questions, to whom did the property belong, was it exempt from execution, and did the defendant so claim when the levy was made? The burden as to these questions, was on the defendant, and, in relation thereto, we desire to say, we have each, severally and separately, read the evidence, and have separately reached the same conclusion, that we cannot interfere with the findings of the court, which stands as the verdict of a jury. The evidence is seriously conflicting, but we think the preponderance is with the plaintiff. It may be it is not so clear as to whether there was a claim made at the time of the levy that the property was exempt. As to this there is the evidence of the two defendants on one side, and that of the plaintiff and the sheriff on the other.

The strong probabilities are that the witnesses on one side or the other are mistaken, or more worthy of belief than the other. The court below has resolved this question in favor of the defendants, and it is impossible for us to say that this is wrong.

A point is made that the defendant on cross-examination testified, "I did not own any teams, or that team individually." Conceding this is material, we think the witness did not intend to be understood to mean or refer to the time he was testifying. The evidence of the witness taken all together, shows that he did own the team, and so testified and asserted throughout his examination as a witness, in terms that cannot be misunderstood, with the apparent exception above stated.

AFFIRMED.

MUNGER V. THE CITY OF MARSHALLTOWN.

59	163
79	206
59	703
88	619

LIABILITY OF CITY TO REPAIR SIDEWALK: CONTRIBUTORY NEGLIGENCE.

Appeal from Marshall Circuit Court.

WEDNESDAY, OCTOBER 18.

ACTION to recover for personal injuries sustained by plaintiff, from a fall, caused by a defective sidewalk, of the city. Judgment upon a verdict was rendered for plaintiff. Defendant appeals. The case has before been in this court. See 56 Iowa, 216.

B. L. Burrett, for appellant.

Brown & Carney, for appellee.

BECK, J.—I. Several objections have been made by plaintiffs' counsel to the abstract, on the ground that it does not sufficiently show the testimony upon which the case was tried, and that no exceptions were taken to the rulings of the court upon instructions to the jury. We think the abstract, in these respects, is sufficient, and the testimony and rulings of the court are properly presented therein. The objections demand no further attention.

II. The defendant makes divers objections to the rulings of the court below upon instructions given and refused, which we will proceed to consider as fully as they demand. The first and third instructions refused, relate to the care and diligence which defendant was required to exercise to keep the sidewalk in repair. They are substantially covered by the instructions given. It was not necessary to repeat the directions.

III. The second instruction was properly refused, for the reason that it holds, or would have been so understood, that the city was not required to repair its sidewalks when injury thereto was caused by teams and wagons. The instruction in this sense is apparently erroneous. The city is required to repair the sidewalks whatever may have been the cause of injury thereto. If the instruction will not bear the construction just given, it, in that case, simply states that the city was bound to keep the sidewalk in a reasonably safe condition. Instructions given announce this rule.

IV. The fifth and sixth instructions were properly refused, for the reason that they hold the plaintiff cannot recover if she knew the sidewalk was out of repair. If she had this knowledge, and exercised proper care while walking upon, it she is entitled to recover.

V. The second instruction given is complained of as being indefinite. We discover no force in the objection. It fairly states, as it was intended to state, the issues upon which the plaintiff is required to present a preponderance of proof.

VI. The fourth instruction given directs the jury that plaintiff was required to use ordinary care to discover defects in the walk. Counsel for de-

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fendants insist that she must do more; exercise ordinary care to avoid danger. This is true, and other instructions so direct the jury. It was not necessary that the court below should express all its thoughts in one instruction.

VII. The fifth instruction is subjected to criticism. It expresses the rule that if plaintiff was without negligence, and injury was caused by a defect in the sidewalk, negligently permitted by defendant, she is entitled to recover. The jury could not have understood, as claimed by counsel, the instruction as asserting that plaintiff was injured by the defendant negligently permitting a defect in the walk.

VIII. The verdict is sufficiently supported by the testimony.

AFFIRMED.

PEAKE V. VAN LEWVEN ET AL.

FORECLOSURE OF MORTGAGE: DEFENSE OF IMBECILITY: EVIDENCE CONSIDERED.

Appeal from Dallas Circuit Court.

SATURDAY, OCTOBER 21.

THIS is an action to recover the amount of a note for \$1,800, and to foreclose a mortgage executed to secure the same. The cause was tried to the court, and the petition was dismissed. The plaintiff appeals. The facts are stated in the opinion.

White & Woodin and Brown & Dudly, for appellant.

Nourse & Kauffman, and Cardell & Shoetley, for the appellees.

DAY, J.—In 1877, B. F. Van Lewven was in the mercantile business at the town of Perry, in Dallas County, Iowa, and was indebted to Evans, Peake & Co. in the sum of about \$5,000, and to other parties in about the same sum. On the 17th day of July, 1877, B. F. Van Lewven executed to Evans, Peake & Co. a chattel mortgage upon his entire stock of goods at Perry, to secure the said indebtedness. This mortgage was filed for record October 1st, 1877. On the 2nd day of November, 1877, to secure the same indebtedness, B. F. Van Lewven, and Julia A., his wife, executed to Evans, Peake & Co. a mortgage upon certain real estate in the city of Des Moines, subject to two mortgages, aggregating \$1,600. On the same day, B. F. Van Lewven and his wife executed to Evans, Peake & Co. a mortgage upon certain real estate in Dallas County, the two mortgages covering all the real estate of said, Van Lewven except his home-stead. The last of these mortgages was filed for record on the 6th., and the first on the 28th day of November, 1877.

On the 26th day of November, 1877, B. F. Van Lewven filed a voluntary petition in bankruptcy, and he was adjudged a bankrupt on the same day; thereupon, Evans, Peake & Co. took possession of the stock of goods, which then invoiced something over \$6,000, and proceeded to sell the same. Soon thereafter, B. F. Van Lewven filed a petition for composition in bankruptcy, and offered to pay his unsecured creditors, upon confirmation of such composition, thirty cents on the dollar. To enable him to raise the money to effect this composition, William J. Peake, of the firm of Evans, Peake & Co., loaned B. F. Van Lewven \$1,800, on the 15th day of March, 1878, and took therefor the note now in suit, payable two years after date. To secure this note, B. F. Van Lewven and his wife executed a mortgage upon their homestead. Evans, Peake & Co. agreed, upon the confirmation of the composition, to release the mortgage upon the stock of goods, and turn them over again to B. F. Van Lewven.

On the 21st of March, 1878, the composition was approved, and soon thereafter the stock of goods was turned over to Van Lewven, together with \$534 cash, which had been received by Evans, Peake & Co. for sales while in their possession. On the 22d day of June, 1878, the chattel mortgage was canceled. Van Lewven continued to dispose of the stock of goods in the ordinary course of trade until March, 1879, when he sold the stock to K. W. Brown, for about \$2,700. The real estate mortgage to Evans, Peake & Co. has been practically exhausted, and proved insufficient to discharge the debt due therein. On June 27th, 1878, B. F. Van Lewven paid, upon the note in suit, \$200.

I. The defendants allege in their answer, as a defense to the action, that B. F. Van Lewven, at the time of giving the note and mortgage sued upon, was feeble in both mind and body, and was of unsound mind, imbecile, and unable to contract. The evidence taken upon this ground of defense is very voluminous, and it is impracticable to subject it all to review. It appears from the evidence, that B. F. Van Lewven had a paralytic stroke some time in the spring of 1876, he at that time being about forty-five years of age. This enfeebled him very much in body, and, in some measure, affected his mind. He, however, so far recovered that he resumed business, and, prior to the execution of the note and mortgage in question, he made some important trades. His letters, written during the pendency of the bankruptcy proceedings, and which are in evidence, show no indication of a weak or disordered mind, but, upon the contrary, evince at least usual knowledge of affairs, and ordinary memory, tact and ability in matters of business. He managed his composition with creditors with very considerable skill. Upon a careful examination of the entire testimony, we feel constrained to hold that the defense that B. F. Van Lewven was so imbecile or unsound of mind as to be unable to contract, is not sustained.

II. It is claimed that at the execution of the mortgage, William J. Peake, through his attorney and agent, L. J. Brown, agreed that all payments which should be realized from any source, including the real estate mortgaged, should first be applied to the satisfaction of the mortgage upon the homestead. This claim lacks probability, and in our opinion it is not supported by the evidence. Evans, Peake & Co. were already large creditors of Van Lewven, and they were unwilling as a company to make him further

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advancements. It is not reasonable to suppose that, while refusing to advance further to Van Lewven, they would agree that the proceeds of a mortgage which they held should be first applied to the satisfaction of the sum loaned him by William J. Peake. If it was the agreement that the debt was to be paid out of the real estate mortgage, there was really no reason for taking the mortgage in question at all. L. J. Brown, who conducted the transaction on the part of William J. Peake, testifies that the only agreement he made was that, as fast as B. F. Van Lewven realized from the sale of the stock of goods, he might make payments upon the note and mortgage.

We are satisfied from the entire testimony, including the letters of Van Lewven, and the subsequent application, without objection, of the sums realized from the real estate mortgaged to Evans, Peake & Co. to the payment of the debt due them, that the real transaction was as testified by Brown. The record, in our opinion, discloses no defense to the note and mortgage sued upon. The plaintiff is entitled to judgment for the amount of the note, less a credit of \$200, of the date June 27, 1878, and to a decree of foreclosure of the mortgage.

REVERSED.

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ABATEMENT.

1. PENDENCY OF ANOTHER ACTION. The pendency of another action to enjoin the sheriff and the execution plaintiff from selling the property was no bar to this action, by the same plaintiff, to quiet the title to the property as against a third person, who purchased at the sheriff's sale. *Jones v. Brandt*, 932.

ADMINISTRATOR.

1. RIGHT TO ACQUIRE TITLE TO PROPERTY OF DECEDENT. Where the property of decedent was sold at judicial sale, held the the administratrix who was decedent's widow, was not, on account of her fiduciary relation to the estate, precluded from taking to herself an assignment of the certificate of purchase from a third party, and that a deed made to her thereunder gave her as good a title to the property, as against the heirs, as such a deed would have given to her assignor. *Welch v. McGrath*, 519.
2. ——. In the absence of fraud, one who, as a trustee, has sold an estate, may afterwards purchase it for himself. *Id.*
3. ——. A purchase by an executor under an execution against his testator is not void, but simply voidable at the election of the legatees, exercised within a reasonable time. *Id.*

See EVIDENCE, 9.

ESTATES OF DECEDENTS.

AMENDMENT.

1. OF PETITION AFTER APPEAL TO CIRCUIT COURT. See Appeal, 2.

ADVERSE POSSESSION.

1. EVIDENCE OF. See Evidence, 13.

AGENCY.

1. PRESIDENT OF BANK AGENT OF BANK. If the contract was with the bank, and was made with the president of the bank, and the stock provided in the contract to be delivered was transferred to the president, he would, under the law, hold the stock for the bank, and it would be regarded as the bank's property. *Markley, Receiver, v. Rhodes*, 57.
2. AGENT TO COLLECT NOTES: NEGLIGENCE: FACTS NOT CONSTITUTING. Where defendant received from his brother, for collection, certain notes which did not fall due till after the brother's death, and the defendant continued to hold the notes until the makers became insolvent, no demand having been made for the notes by the brother's foreign adminis-

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trator, held that defendant's agency ceased with the death of his brother, after which he had no authority to collect the notes, and that he was not liable to the brother's only heir for neglect in not having an administrator of the brother's estate appointed in this State, and that he was not liable as an executor *de son tort*. *Darr v. Darr*, 81.

3. INTEREST: RATE OF: FRAUD. J., plaintiff's intestate, was agent of the intervenor, K., and, as such agent, represented to K. that he had sold K.'s forty acres for \$1,200 to E., and requested K. to forward to him a deed to deliver to E., which K. did. J. did not sell the land to E., but traded it to him for the lot in controversy, estimating the land at \$1,200 and the lot at \$2,000, and applying the difference on a debt due him from E. J. afterwards sold the lot to defendants for \$2,000—\$200 cash and the balance in mortgage notes bearing ten per cent interest payable annually. Some of the notes were paid. Judgment on foreclosure was obtained in this cause for \$1,113. On the trial of the cause as between plaintiff and K., as inventor, held that, in estimating the amount which K. was entitled to recover as against the estate of J., interest should be computed on the amount admitted to be due K., at the same rate that was received on the sale of the lot, and that to compute such interest at six per cent per annum only, would be to allow the estate of J. to profit by his own fraud. *Munson, Adm'r, v. Plummer*, 136.
4. FRAUDULENT MINGLING OF FUNDS: EXPENSE OF SECURING THE MIXED FUND: LIEN. In the above case it was held that, in the absence of a showing that there were other creditors of the estate of J., besides the intervenor, or that there were no other funds out of which to reimburse the plaintiff, administrator, for expenses incurred by him on behalf of the estate, for the purpose of determining the amount due from the defendants, establishing the lien, and recovering to the estate the property, no part of such expenses nor of the costs of the intervention should be borne by the intervenor, but that he should recover the full amount of the money yet due him, with interests; also that he should have a lien thereon on the lot in controversy to the extent of the judgment against the defendants. *Id.*
5. TO COLLECT NOTE: AUTHORITY LIMITED. An agent authorized to collect a note cannot bind his principal by an expression of his opinion as to the reading of a doubtful word in the note. *Van Vechten v. Smith*, 173.
6. AGENT: ACQUIESCE IN ACTS OF: REASONABLE TIME TO OBJCT. It was error for the court to instruct the jury as to what constituted a reasonable time within which plaintiff was required to object to the acts of his agent, in order to avoid being bound thereby; that question should have been submitted to the jury. *Minnesota Linseed Oil Co. v. Montague & Smith*, 448.

See RAILROADS, 8.

ESTOPPEL, 6.

ALIMONY.

See DIVORCE AND ALIMONY.

APPEAL.

1. LESS THAN \$100: CERTIFICATE OF JUDGE. The appellant's abstract recited as follows: "The court gave the certificate of the question involved, upon which it was desirable to have the opinion of the Supreme Court, and stated the particular question of law to be: Where suit is brought upon a note barred on its face by the statute of limitations

(limitation being pleaded by defendant), is the burden of proof on plaintiff to show the exception taking the note out of the statute?" "Held not a sufficient certificate, under section 3173 of the Code, to give this court jurisdiction of a cause involving less than \$100. *Yant v. Harvey*, 55 Iowa, 421, distinguished. *Miliken v. Daugherty*, 294.

2. FROM JUSTICE'S COURT: AMENDMENT OF PETITION: PRACTICE. Where a judgment was obtained before a justice of the peace on a note on which there could be no legal recovery, it was error for the Circuit Court on appeal to allow plaintiff, against defendant's objections, to amend his petition, by setting up a mistake in the execution of the note, and asking equitable relief in the reformation of the instrument. To do so was a violation of section 3501 of the Code, which provides that on appeal "no new demand or counter-claim can be introduced into a case after it comes into the Circuit Court, unless by consent." *Hollen v. Davis*, 444.
3. FROM JUSTICE'S COURT: AMOUNT IN CONTROVERSY. Where plaintiff sued in justice's court on an account of \$32.15, but admitted payments to the amount of \$12, and the defendants for answer denied all indebtedness and pleaded payments to the amount of \$29, but asked for no judgment, held that defendants' pleading was a defense simply, and not a counter-claim; that the amount in controversy was not greater than the amount of plaintiff's claim, to-wit, \$20.15; and that the Circuit Court should have dismissed the case on appeal, on defendants' motion, for want of jurisdiction—the amount in controversy being less than \$25. *Boyle v. Wilcox*, 466.
4. PRACTICE: CERTIFYING QUESTIONS IN CASES INVOLVING LESS THAN \$100. In cases involving less than \$100, the statute does not contemplate that abstract question of law shall be certified to this court, but such questions only as are decisive of the case, and such only will be considered. *Eckert & Williams v. Pickel*, 545.
5. TO SUPREME COURT: LESS THAN \$100: QUESTION OF EVIDENCE TO SUPPORT VERDICT. Although the question as to the sufficiency of the evidence to support a verdict may in a certain sense be said to become a question of law, yet it is not such a question as the legislature intended should be certified to this court in cases involving less than \$100. *Hudson v. C., & N. W. R. Co.*, 581.
6. TO SUPREME COURT: CASES INVOLVING NOT MORE THAN \$100: PROVINCE OF THE COURT. When appeals are taken to this court in cases involving not more than \$100, it is not the province of the court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued, where it is shown affirmatively that they do not arise in the case. *Spiesberger Bro's v. Thomas*, 606.
7. TO SUPREME COURT: IMPROPER PARTIES APPELLANT. Where judgment was rendered against the estate of an administrator, he being at the time dead, and an appeal to the Supreme Court was taken from such judgment in the name of the administrator and his bondsmen, held that the appeal must be dismissed for want of proper parties appellant:—the administrator being dead, the cause could not proceed in his name, and there being no judgment against the bondsmen, they could not prosecute the appeal. *Tracy v. Roberts*, 624.
8. TO SUPREME COURT: TIME OF PERFECTING. A notice of appeal to the Supreme Court, filed six months and ten days after the date of the judgment appealed from, is too late under section 3173 of the Code. *Patterson v. Jack*, 632.

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9. To SUPREME COURT: FROM MOTION IN EQUITY CASE: ERRORS MUST BE ASSIGNED. When an appeal is taken to the Supreme Court in an equity case from a ruling on a motion or demurrer, errors must be assigned. *Id.*
10. ——: INSUFFICIENT ASSIGNMENT OF ERRORS. Where, in a motion for a new trial, six grounds are relied on, an assignment of errors in this form: "The court erred in overruling defendant's motion for a new trial, and to modify and amend the decree," is not sufficiently specific. *Id.*
11. TO THE SUPREME COURT: AMOUNT LESS THAN \$100: QUESTIONS OF LAW ONLY TO BE CERTIFIED. *Landers & Son v. Boyd*, 758.
12. To SUPREME COURT: See Practice in Supreme Court, 5, 26; Costs, 1; Venue 1, 7.
13. FROM FENCE VIEWERS. See Fences, 7.

ARGUMENT.

1. ORDER OF. See Practice, 4.

ASSAULT AND BATTERY.

See TORTS, 1, 2, 8.

DAMAGES, 1.

ASSESSMENT.

1. OF LANDS: VIEWING THE PROPERTY: STATUTE CONSTRUED. Under section 720 of the Revision (Code, Sec. 812) it is not necessary to the validity of an assessment of real property that the assessor shall personally examine the land. *Beeson v. Johns*, 166.
2. ——: CORRECTION BY AUDITOR: BURDEN OF PROOF. In an action to set aside a tax deed, where in the description of the land on the assessment roll as returned by the assessor, the letters "SW" have been changed to "NE," and there is evidence tending to show that the change was made with authority by the deputy auditor (Rev. 747), and the roll so changed has been regarded as correct in all subsequent records and proceedings, including the sale of the land for taxes, the burden of proof is upon the plaintiff, whose duty it was to see that the land was properly assessed, to show that the assessment as shown by the changed roll was unauthorized and void. *Id.*
3. UNEQUAL: RESIDENTS AND NON-RESIDENTS. Where no fraud is shown, and it appears only that improved lands were not assessed as high in proportion as unimproved, but that no discrimination was made between the unimproved lands of residents and non-residents, the assessment was not void, under the ordinance of 1787, or the act of Congress admitting the State of Iowa into the Union. DAY, J., *dissent in part*, basing his opinion on his view of the facts. *Id.*

ASSIGNMENT.

See FORMER ADJUDICATION, 2.

MORTGAGE, 3.

ASSIGNMENT OF ERRORS

See APPEAL, 9, 10.

PRACTICE IN SUPREME COURT, 20.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS: FACTS CONSTITUTING: VOID FOR PARTIALITY.** Where a husband executed to his wife an assignment of all his personal property (his real estate being encumbered to about the full extent of its value), the only consideration of which assignment was an agreement made by the wife, in a chattel mortgage which she executed the next day, which embraced all the property included in the assignment, and wherein the creditors of the husband were divided into three classes, which creditors she agreed to pay, giving preference to the classes in their order, *held* that the assignment and chattel mortgage constituted parts of the same transaction, and, in legal contemplation, amounted to a general assignment for the benefit of creditors; and that, as such an assignment, it was void, because it gave preference to certain creditors. *Van Horn v. Smith, sheriff*, 142.
2. **MECHANIC'S LIEN.** An assignee for the benefit of creditors has the right to enforce a mechanic's lien existing in favor of the assignors. *German Bank v. Schloth*, 316.

ATTACHMENT.

1. **ATTACHMENT: MOTION TO DISCHARGE.** Where a motion was made to discharge an attachment based on the allegation that the defendant was about to remove his property out of the State without leaving sufficient for the payment of his debts, and said motion was supported by affidavits showing that the attached property was exempt, *held* that the motion should have been sustained under section 3018 of the Code. *Hastings v. Phoenix*, 394.
2. **OF EXEMPT PROPERTY: MOTION TO DISCHARGE ATTACHMENT: PRACTICE: BURDEN OF PROOF: EVIDENCE.** *Joyce v. Miller*, 761.

See DIVORCE, 2.

JUDGMENT, 5.

MORTGAGE, 3.

BASTARDY.

See VERDICT, 4, 5.

ATTORNEY'S FEES.

See JURISDICTION, 5.

BILL OF EXCEPTIONS.

1. **TIME OF SIGNING AND FILING.** See Practice in Supreme Court, 29.
2. **PRACTICE: PRESERVING EVIDENCE.** Where the original notes of the reporter were duly filed, and then, instead of being referred to in the bill of exceptions, were incorporated therein, and a long-hand copy, duly certified, was inserted in the transcript, *held*, if not a literal, at least a substantial compliance with section 3777 of the Code, as amended by Chapter 195, laws of 1880. *McAnnulty v. Seick*, 586.

See EXCEPTIONS, 1.

BOARD OF SUPERVISORS.

1. **CONTRACT WITH: PROVED BY PAROL.** It is not necessary to the validity of a contract made with the board of supervisors that it be entered on the supervisors' records, but such contract may be proved by parol,— following *Tallock v. Louisa County*, 46 Iowa, 198. *Jordan & McCallum v. Osceola County*, 398.

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2. **RIGHT TO EMPLOY COUNSEL.** A county has the undoubted right to employ counsel to prosecute or defend an action, or to perform other services. *Id.*
3. **MUST ACT IN SESSION.** County supervisors are not authorized to bind the county by a contract made by them individually, but they must act as a board in session in order to do so. *Id.*

See **HIGHWAY**, 3, 4, 5.

PAUPER, 5.

BONDS.

1. **MUNICIPAL BONDS.** See **Municipal Corporations**, 1, 2; **Practice**, 3.
2. **INDEMNIFYING BOND.** See **Execution**, 2, 4.
3. **APPEARANCE BOND: VENUE IN ACTION ON.** See **Venue**, 3.
4. **OF ROAD SUPERVISORS.** See **Road Supervisor**, 1; **Township Clerk**, 1.

BOUNDARY LINES.

1. **STATUTE FOR DETERMINING HELD CONSTITUTIONAL.** See **Constitutional Law**, 1.

BURDEN OF PROOF.

See **CONTRACT**, 1

ASSESSMENT, 2.

FRAUD, 4.

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CITIES AND TOWNS.

1. **TOWN ORDINANCE: INTOXICATING LIQUORS: EXCESS OF CORPORATE POWER.** Towns have power to prohibit the sale of such intoxicating liquors only as are not prohibited by statute, and an ordinance which prohibits the sale of *all* kinds of intoxicating liquors, including wine and beer and brandy peaches, is invalid, so far as the prohibition extends to liquors other than vinous and malt. *Town of Canfield v. Sainer*, 26.
2. ——: DISCREPANCY BETWEEN TITLE AND SUBJECT. Where an ordinance is entitled, "*Regulating the use and sale of intoxicating liquors*," but the substance of the ordinance, as found in the body of it, is entirely *prohibitory*, with no pretense of *regulation*, it is invalid for want of compliance with the law requiring the subject of an ordinance to be clearly expressed in its title. *Id.*
3. **DEFECTIVE SIDEWALKS: INSTRUCTION.** Where plaintiff sought to recover damages for injuries sustained by her from stepping into a *hole* in a broken sidewalk, at a place which was free from snow and ice, and the evidence showed that the injury resulted wholly from a fall caused by plaintiff's stepping into a hole, it was error to instruct the jury that the defendant was liable for injuries resulting from plaintiff's stepping on the *ice* on the sidewalk. Such instruction was clearly misleading and prejudicial, as directing the jury to consider matters not found in the petition or evidence. *Cressy v. Town of Postville*, 62.
4. **CONTRIBUTORY NEGLIGENCE.** Ordinary care is to be used at all times and in all places in using sidewalks, and if, by the exercise of such care, the hole in question could have been discovered by plaintiff, she cannot recover for injuries resulting to her from stepping into it. *Id.*
5. **OBSTRUCTIONS IN STREETS: LIABILITY FOR.** A town is not liable for an obstruction in a street unless it be shown that, through its officers, it had notice of the obstruction, or the obstruction had existed so long as to raise a presumption that knowledge thereof was possessed by the town officers; but the fact that a sleigh had stood ten or fifteen minutes in a street will not raise a presumption of such knowledge. *Sikes v. Town of Manchester*, 65.
6. ——: WHAT CONSTITUTES AN OBSTRUCTION. A sleigh standing ten or fifteen minutes in a village street for the purpose of unloading goods, ought not to be regarded as an obstruction; and it is not clear that, under any circumstances, a village street would in law be regarded as obstructed by the fact that one-third or one half of it was occupied during the greater portion of the day by the vehicles of farmers, while their teams were feeding at an adjacent stable. *Id.*
7. **TOWN ORDINANCE: TWO MILE LIMIT.** In February, 1878, and before chapter 119, acts of 1878, became a law, the town passed an ordinance providing "that no person shall sell within the limits of said town, or of any territory over which the town may have jurisdiction for that purpose, any beer or wine, or any malt or vinous liquors * * * without first procuring from the mayor a license, etc." and defendant sold beer in September, 1878, outside of, but within one mile of the corporate limits of, the town: held that the ordinance applied to the two mile limit over which the town subsequently obtained jurisdiction by said statute, and that defendant was properly found guilty thereunder. *Town of Toledo v. Edens*, 352.
8. **CONSTITUTIONAL LAW: STATUTE CONSTRUED.** Chapter 119, acts of 1878, extending the jurisdiction of cities and towns, for the purpose of regulating, prohibiting and licensing the sale of ale, wine and beer, two

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- miles beyond the limits of such corporations, *held* constitutional and valid. Following *State v. Schroder*, 51 Iowa, 197, and *Town of Centerville v. Miller*, *Id.*, 712. *Id.*
9. CRIMINAL LAW: FINE NOT EXCESSIVE. The ordinance being valid, and providing a fine for its violation of not less than \$50, a fine of \$50 imposed for its violation cannot be considered excessive. *Id.*
 10. EFFECT OF PLATTING: RESERVATION FOR MILL-RACE: LIABILITY FOR BRIDGING. The acknowledgment or recording of a town or city plat is equivalent to a deed in fee simple of such portion of the platted premises as are set apart for streets; and by the reservation, in such act, of the right to construct and use a mill-race across one of the streets included in the plat, the owners of the land platted simply retain an easement in such street; and when such race is constructed, they are bound to construct and keep in repair a bridge across the same where it cuts the street; and, when they neglect and refuse so to do, and the city repairs the bridge at its own expense, it may recover the same of the owners of the race. *City of Waterloo v. Union Mill Co.*, 437.
 11. POWER OVER NUISANCES. Cities and incorporated towns have no authority to provide by ordinance for the punishment by fine of persons guilty of obstructing the streets by buildings or otherwise. Such obstructions are declared by section 4089 of the Code to be *nuisances*, and section 456 confers upon cities and towns the power only to *abate* nuisances. The power thus expressly granted cannot be extended. *Incorporated Town of Nevada v. Hutchins*, 506.
 12. LIABILITY OF CITY TO REPAIR SIDEWALK: CONTRIBUTORY NEGLIGENCE. *Munger v. City of Marshalltown*, 763.

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1. NEGLIGENCE OF: ACTION DISMISSED FOR. See Practice, 16.

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1. FAILURE OF. See Contract, 4.

2. ILLEGAL. See Contract, 12, 14.

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CONSTITUTIONAL LAW.

1. REASONABLE DOUBT: STATUTE HELD CONSTITUTIONAL. In determining the constitutionality of a statute, even a reasonable doubt must be solved in favor of the legislative action, and the act sustained; and section 2 of chapter 8 of the laws of 1874, which provides a summary process for determining and locating the true boundary line between

land owners, without any issue made in court, or trial by jury, held not in conflict with section 9, article 1 of the constitution, which provides that the right of trial by jury shall remain inviolate, and that no person shall be deprived of life, liberty or property, without due process of law. *Gates v. Brooks*, 510.

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PRACTICE IN SUPREME COURT, 90.

CONTEMPT.

1. POWER TO PUNISH FOR: INSANE HOSPITAL VISITING BOARD. As no power is conferred upon the visiting committee of an insane hospital, either by special or general provision of the Code, to punish for a contempt, such committee cannot exercise such power, and the plaintiff who was restrained of his liberty upon the order of such committee, for refusing to testify before it, was properly discharged on writ of *habeas corpus*. *Brown v. Davidson*, 461.

CONTRACT.

1. WRITTEN LEASE VARIED BY SUBSEQUENT PAROL: EVIDENCE: TENDER. Where in an action for rent upon a written lease, providing for the payment of \$20 per month, the defendant sets up a subsequent parol contract providing for the payment of only \$16 $\frac{2}{3}$ per month, the burden is upon him to establish the subsequent parol contract and the consideration on which it is based; and this is not done by proof of the fact that plaintiff accepted \$16 $\frac{2}{3}$ per month for a part of the time; nor is plaintiff's action barred by the tender of \$16 $\frac{2}{3}$ per month for that portion of the term for which the suit is brought. *Wheeler v. Baker*, 86.
2. WRITTEN OFFER AND ORAL ACCEPTANCE: STATUTE OF LIMITATIONS. Where a proposition is in writing, and the acceptance of it is oral, the contract is an oral contract, and an action thereon is barred after the lapse of nearly nine years. So held in this case, where defendant made a proposition by letter to the plaintiff, and the plaintiff wrote to a third party to accept it, if he could not get better terms, and the acceptance by such third party was oral. *Hulbert v. Atherton*, 91.
3. OF CHAIRMAN OF STREET COMMITTEE: CITY NOT BOUND BY. See Municipal Corporations, 3.
4. SALE OF LAND: PARTIAL FAILURE OF CONSIDERATION. Where plaintiff sold land to the defendant, and for \$100 of the consideration agreed to procure the establishment of a highway along one side of the land, which he failed to do, held, in an action to recover a balance of the purchase-money of the defendant, that he could not recover the \$100. *Dicken v. Morgan*, 157.
5. RESCISSION: EVIDENCE EXCLUDED. A party cannot rescind a contract without surrendering, or offering to surrender, all that he has received under such contract; and it was held not error in this case for the court

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- to exclude evidence offered by the defendant that he had surrendered the stock, when there was no pretense that he had surrendered, or offered to surrender, the due bill. *Van Vechten v. Smith*, 173.
6. **RESCISSION OF: EQUITY.** Equity will not decree the rescission of a contract at the suit of one party thereto on the ground that the other has failed to fulfill his part of the engagement, if the defaulting party cannot be placed *in statu quo*, and injury would result to him from the rescission. In such cases, the parties must resort to the courts of law, and seek the damages to which they are entitled by reason of the breaches of the contract. *Stringer v. K., Mt. P. & N. R. Co.*, 277.
 7. **SUBSCRIPTION TO STOCK.** Garnishee in writing, signed in his own name, agreed to take certain shares of the capital stock of a corporation "to be paid by Peck." Held that the garnishee was personally liable therefor to the corporation, and to the creditors of the corporation on process of garnishment. *Langford & Orton v. Ottumwa Water Power Co., Garnishee*, 233.
 8. **FOR ACT OF ANOTHER.** When one in writing contracts in his own name for the act of another, he becomes thereby personally bound, unless it appears from the contract itself that he did not intend to bind himself personally. *Id.*
 9. **SALE: RESCISSION FOR FRAUD: RECOVERY OF GOODS.** In an action to avoid a contract for the sale of goods and to recover the possession of the goods, it is not enough to allege that the defendant, when he purchased the goods, knew that he was hopelessly insolvent and unable to pay for the goods for which he was already indebted, and that plaintiff was wholly ignorant of his insolvency. It is necessary in such a case to allege that the purchase was made with the intent to take advantage of the insolvency and not to pay for the goods:—Following *Otsego Starch Factory v. Lendum*, 57 Iowa, 573. *Houghtaling & Co. v. Hills*, 287.
 10. **MISTAKE: EQUITABLE RELIEF.** If, after making an agreement, in the process of reducing such agreement to a written form, the writing, by means of a mistake of the law, or rather a mistake as to the legal effect of the language used, fails to express the contract which the parties actually entered into, equity will interfere to reform it or prevent its enforcement, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact, following *Nowlin v. Pyne*, 47 Iowa, 293; and *Stafford v. Fetter*, 55 Iowa, 484; and distinguishing *Moorman v. Collier*, 32 Iowa, 138; *Glenn v. Stalter*, 42 Iowa, 107, and *Gerald v. Elley*, 45 Iowa, 322. *Reed v. Root*, 359.
 11. _____: _____: RULE APPLIED. In this case plaintiff leased certain buildings to defendant with the mutual understanding that, in case the buildings were destroyed, defendant should be released from further liability for rent, and they were advised that the language used in the written lease properly expressed their agreement, which, as a matter of law, it did not. The buildings were destroyed by a tornado, and plaintiff's assignee sued for the rent accruing after such destruction: Held that the written lease did not express the contract of the parties and that plaintiff could not recover. *Id.*
 12. **ILLEGAL CONSIDERATION: GAMBLING ON BOARD OF TRADE.** The court instructed the jury in substance that the plaintiffs could not establish title to the corn in suit through the receipts in question, if they were issued to pay losses which the maker of the receipts might suffer in the purchase and sale of commodities, wherein it was not the purpose, intention or expectation of either of the parties that such purchases or sales, should be actually consummated by delivery or receipt of the thing purchased or sold, but, on the contrary, it was the purpose of all the

parties that the same should be settled by the payment of the difference between the purchase or selling price and the market price at the time of settlement, and that the receipts, if so issued, were void; *held*, correct, and in accord with *Pixley v. Boynton*, 79 Ill., 351. *Lowe Bros. & Co. v. Young*, 364.

13. **NEGLIGENT SIGNER BOUND.** It is well settled that where a party having capacity to read an instrument signs it without reading it, and without requesting it to be read to him, he is bound thereby, if no device is used to put him off his guard. *Gulliher v. C. R. I. & P. R. Co.*, 416.
14. **ILLEGAL CONSIDERATION: GAMBLING "ON 'CHANGE."** To invalidate a contract on the ground of the illegality of the transaction, it must be shown by a preponderance of the evidence that *both* parties participated in the intention which, if executed, renders the transaction illegal; therefore, *held* in this case (being a suit on a note given for losses incurred in trading in grain "options"), that although the defendant intended simply to gamble on the fluctuations of the markets, yet, since the evidence shows affirmatively that the transaction on the part of plaintiffs was a *bona fide* sale of grain to be actually delivered at a future time, they are entitled to recover. *Murray, Nelson & Co. v. Ocheltree*, 435.
15. **MODIFICATION OF: PARTIAL PERFORMANCE: CONSIDERATION.** Where the parties entered into a written contract, and afterwards orally agreed to a modification thereof, and the plaintiff performed his part of the modified contract and the defendant accepted of such performance, the defendant cannot be heard to say that there was no consideration for the modification. *Maxwell v. Graves*, 613.

See JUDICIAL SALE, 1.

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HUSBAND AND WIFE, 2.

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CONVEYANCE.

1. **RIGHT OF WAY DEED: CONDITIONS SUBSEQUENT.** A conveyance of right of way to a railroad company will not be set aside in equity, merely because the grantee has failed to perform conditions subsequent contained in the deed. *Stringer v. K., Mt. P. & N. R. Co.*, 277.
2. **QUITCLAIM DEED: RIGHTS OF GRANTEE.** A grantee who takes real estate by a quitclaim deed only cannot be regarded as a good faith purchaser, and is not entitled to protection as against prior equities of which he had no notice, but one who takes from such grantee by a warranty deed, in good faith and without notice of such equities will be protected. *Raymond v. Morrison*, 871.

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COSTS.

1. **APPEAL TO SUPREME COURT: AMOUNT AND PRIORITY OF LIEN.** In this case, where appellant succeeded in this court in having the amount of his lien increased, but failed in having it advanced over the lien of a prior mortgage, it was adjudged that appellant should recover the costs of the appeal, but that these costs should not be taken out of the proceeds of the property before the prior lien-holders have been fully paid. *German Bank v. Schloth*, 316.

See **PRACTICE IN SUPREME COURT**, 1, 7, 31.

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See **PAUPER**, 1, 2, 4.

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CRIMINAL LAW.

1. **INDICTMENT: MANNER OF PRESENTMENT: PRESUMPTION OF REGULARITY.** When the objection is raised to an indictment that it was not presented in the manner prescribed by the Code, it will be presumed, in the absence of a showing in the record to the contrary, that the requirements of the statute were complied with. *State v. McIntire*, 267.
2. _____: **OMISSION OF TITLE NOT FATAL: STATUTE CONSTRUED.** An indictment will not be set aside because it does not contain the title of the cause and the names of the parties, as prescribed by Code, § 4297. *Id.*
3. _____: **LARCENY: ALLEGATION OF OWNERSHIP: STATUTE CONSTRUED.** Under section 4305, par. 6, of the Code, in an indictment for larceny, it is a sufficient designation of the person injured to allege that the owner of the stolen property is to the jurors unknown; and the allegation that the goods were taken from the possession of the railroad company is sufficient, as showing special property in the company, to designate the person injured by the crime. *Id.*
4. _____: **OMISSION OF TITLE: STATUTE CONSTRUED.** It is not a valid objection to an indictment that on the face of it there is no title to the action and that the names of the parties are not set forth in such title as prescribed by the form given in section 4297 of the Code. *State v. McIntire*, 264.
5. _____: **BURGLARY: ALLEGATION OF OWNERSHIP: STATUTE CONSTRUED.** Under Code, section 4203, and subdivision six, section 4305, in an indictment for burglary, it is a sufficient designation of the person injured to allege that the owner of the property is to the jurors unknown, and the charge that the car broken was in the possession, care, control and custody of the C., B. & Q. Railroad Company, is an averment that said company had a special property in the car, and was sufficient to allege the offense as against that company. *Id.*

6. ——— : LARCENY OF BANK CHECK: ALLEGATION OF VALUE. In an indictment for the larceny of a bank check, it is a sufficient allegation of its value to say that it was "of the value of \$20.97," that being equivalent to saying that the instrument called for at least that amount of money. *Code*, § 3914. *State v. Pierson*, 271.
7. ——— : DESCRIPTION OF PROPERTY. In such indictment the stolen property need not be described with any more particularity than any other stolen property; and it was sufficient in this case to describe the property as a check or order for the payment of money, stating by whom signed, where payable, date, owner and value. *Id.*
8. ——— : SUFFICIENCY OF: GAMBLING. An indictment charging that the defendant "did keep a house, shop and place under his care and control, in which said house, shop and place, he did permit and suffer divers persons, to the jurors unknown, to play at cards, dice, dominoes, and other games for money, cigars, beer, and other things, contrary to the form of the statute, etc." held sufficient under section 4026 of the Code; following *State v. Cure*, 7 Iowa, 479; *State v. Cooster*, 10 Iowa, 452; and *State v. Middleton*, 11 Iowa, 246. *State v. Kauffman*, 273.
9. ——— : ON MINUTES OF TESTIMONY. It is no objection to a second indictment found by the same grand jury that it was found on the minutes of the evidence attached to the first indictment. There was no necessity for the grand jury to see and hear the witnesses again. *State v. Clapper*, 279.
10. ——— : BAILEE AS OWNER. In an indictment for taking goods from the custody of a sheriff, the sheriff was alleged to be the owner of the goods: held not bad on demurrer, as the sheriff was a bailee in possession. *Id.*
11. INDICTMENT FOR BURGLARY: DUPPLICITY. An indictment for burglary with intent to steal is not bad for duplicity because it contains allegations of facts constituting larceny. The charge of stealing may be regarded as a mere pleading of evidence or surplusage which might properly have been introduced to support the charge of an intent to steal.—Following *State v. Hayden*, 45 Iowa, 11; and distinguishing *State v. Ridley*, 48 Iowa, 370. *State v. Shaffer*, 290.
12. BURGLARY: EVIDENCE: POSSESSION OF GOODS. The presumption of guilt which arises, in a case of larceny, from the possession of goods recently stolen, does not apply with equal force to the crime of burglary with intent to steal. Such possession is evidence tending to show that the defendant committed the burglary, but is not of itself sufficient, even if unexplained, to warrant a conviction. *Id.*
13. ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER. The defendant being on trial on an indictment for an assault with intent to commit *murder*, held that it was not error for the court to instruct the jury that upon certain conclusions as to the evidence they would be justified in finding the defendant guilty of an assault with intent to commit *manslaughter*—the lesser crime being necessarily included in the greater.—Following *State v. White*, 45 Iowa, 325. *State v. Connor*, 357.
14. INDICTMENT: Duplicity CURED. Defendant was charged in the same indictment with two distinct offenses, but before any evidence was introduced, the district attorney dismissed as to the count charging one of the offenses, and the defendant pleaded guilty as to the other; held, that the duplicity was cured and that the defendant was properly convicted. *State v. Buck*, 382.
15. PRACTICE IN THE SUPREME COURT: REDUCTION OF SENTENCE. This court will not interfere with the discretion of the District Court in imposing a sentence when all the evidence which was before that court is not before this. *Id.*

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16. **WITHDRAWING PLEA OF GUILTY AFTER SENTENCE.** After sentence, the defendant moved for leave to withdraw the plea of guilty and for a new trial, on the ground that he was surprised by the magnitude of the sentence; *held* that, under the circumstances of this case (see opinion), the court properly overruled the motion. *Id.*
17. **MISCONDUCT OF STATE'S ATTORNEY.** It is provided by section 3636 of the Code that the attorney for the State shall not refer to the fact that the defendant did not testify on his own behalf. In this case there was a contention as to the exact language used by the attorney, and as the District Court may be presumed to have heard what was said, it will also be presumed that that court was justified in overruling defendant's motion for a new trial based on the alleged misconduct of the attorney in that regard. *State v. Black*, 390.
18. **INDICTMENT: DUPPLICITY: FORGING AND UTTERING FORGED PAPER.** Forging and uttering forged paper are two distinct offenses, and cannot be charged in the same indictment:—Following *State v. McCormick*, 56 Iowa, 585. *State v. Henry*, 390.
19. _____: _____: **ERROR WAIVED.** The objection that an indictment was bad for duplicity cannot be first raised in this court. *Id.*
20. _____: _____: **SENTENCE MODIFIED.** In view of the fact that appellant's counsel may have waived rights by relying on *State v. Nichols*, 38 Iowa, 110, which has been recently overruled in *State v. McCormack*, 56 Iowa, 585, the sentence of defendant was modified and limited to the four years imposed upon the first count of the indictment. *Id.*
21. **MISCONDUCT OF DISTRICT ATTORNEY.** If it were admitted to be true, as alleged, that on the trial for an assault with intent to commit rape, the district attorney pointed out the defendant to the prosecutrix before she identified him as the person who made the assault upon her, this court is not prepared to say that such misconduct would be sufficient ground for reversing the judgment of conviction. It would weaken the testimony of the prosecutrix on the point of identification, but of that the jury could judge. *State v. Blunt*, 468.
22. **ALIBI: TESTIMONY TO PROVE.** The court instructed the jury as follows: "It is recognized in the law that the defense of *alibi* is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution;" *held* correct in law and properly given in this case. *Id.*
23. **TWICE IN JEOPARDY: ADJOURNMENT OF COURT PENDING TRIAL.** While it is a general rule that a person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been impaneled and sworn, yet to this general rule there are many exceptions; and in this case, being a trial for forgery, when, after all the evidence had been introduced, the presiding judge was called home by telegram on account of the illness of his wife, and he thereupon adjourned the court and discharged the jury until the following Friday, and on the following Friday he by telegram ordered the court to be finally adjourned, and on the next Monday his wife died; *held* that the emergency justified the adjournment of the court; that the defendant had not been in legal jeopardy, and was properly put on trial on the same indictment at a subsequent term of the court. *State v. Tatman*, 471.
24. **PRACTICE: COMMENTS ON DEFENDANT'S TESTIMONY.** Where the defendant offered himself as a witness and testified on his own behalf, it was not a violation of section 3636 of the Code for the district attorney,

- in his argument to the jury, to comment on the fact that the defendant had testified to a part only of his defense, and had omitted to testify upon other material facts in the case within his knowledge, and to urge that such omission should be considered by the jury. *Id.*
25. INDICTMENT: LARCENY. An indictment for larceny was as follows: "The grand jury of the county of Decatur, in the name, and by the authority of the State of Iowa, accuse the defendant, D. P. Lillard, of the crime of larceny, committed as follows: The said defendant, D. P. Lillard, on the ninth day of September, 1879, in the county aforesaid, one mare," etc.—*held* good as against the objection that it did not charge that any crime was committed in the State of Iowa. *State v. Lillard*, 479.
26. LARCENY: EVIDENCE CONSIDERED. Upon consideration of the evidence in this case, it was *held* sufficient to support the verdict of guilty. *Id.*
27. ——: VENUE. In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods. *Id.*
28. PRACTICE: FAILURE OF JUDGE TO FIX AMOUNT OF BAIL ON IMPOSING SENTENCE. Where the court, on rendering judgment of imprisonment for grand larceny, failed to fix the amount of bail as required by section 4511 of the Code, the defendant was entitled to have the omission corrected, but he was not on *habeas corpus* entitled to be discharged from custody on account of such omission. *Murphy v. McMillan*, 515.
29. SELLING INTOXICATING LIQUORS: INFORMATION. In an information for selling intoxicating liquors it is not necessary to set forth the kind of liquor sold. *Foreman v. Hunter, Sheriff*, 550.

See WITNESSES, 1.

CITIES AND TOWNS, 1.

CROPS.

1. CHATTEL MORTGAGE OF. See Mortgage, 2.

DAMAGES.

1. ASSAULT AND BATTERY: INSTRUCTION: MEASURE OF DAMAGES. In an action for an assault and battery, where the defendant asked an instruction to the effect that the plaintiff cannot recover for permanent injuries, unless they are proved by the preponderance of the evidence, it was not error for the court to add to such instruction a modification to the effect that if the jury found plaintiff entitled to recover for injuries from which he had not recovered, they should consider the length of time it will require him to recover as shown by the evidence. *Gronan v. Kukkuck*, 18.
2. MEASURE OF: MARKETABLE VALUE: INSTRUCTION. An instruction to the effect that the marketable value of property is the amount for which the property would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated, *held*, correct, and not necessarily calculated to raise the inference that a forced sale was meant by the court. *Everett v. U. P. R. Co.*, 243.
3. MEASURE OF. See Lease, 1; Vendor and Vendee, 2.

See TORTS, 1, 2, 8.

RAILROADS, 13, 14, 24.

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DECREE.

See JUDGMENT AND DECREE.

DEED.

See CONVEYANCE.

DEPOSITIONS.

1. TAKEN AFTER DEATH OF PARTY: NOT EVIDENCE. Where the plaintiff in an action gave notice of taking depositions, but died before the day named, and no one was substituted as plaintiff in his stead, but the depositions were taken, *held* that, in the same action, after plaintiff's administrator had been substituted as plaintiff, the court should have sustained defendant's motion to strike from the files or suppress the deposition, as it was binding neither on the substituted plaintiff, nor on the defendant. *Hershman, Adm'r, v. Suhela*, 93.

See EVIDENCE, 2, 4.

PRACTICE IN SUPREME COURT, 9.

DETINUE.

See VENUE, 5.

DISTRICT ATTORNEY.

1. MISCONDUCT OF. See Criminal Law, 17, 21, 24.

2. LIABILITY OF COUNTY FOR ASSISTANCE TO: POWER OF DISTRICT COURT TO APPOINT ASSISTANT. The District Court has no inherent or statutory power, when the District Attorney is present, to appoint another attorney to assist him in a criminal prosecution, and thereby to bind the county to pay for such assistance. *Seaton v. Polk Co.*, 626.

DEMAND.

1. NOTE PAYABLE IN BANK STOCK: ACTION ON: DEMAND NECESSARY. On a note payable in bank stock, an action for a money judgment cannot be maintained, until it is shown that the note was reduced to a money claim by demand pursuant to its terms, and that the defendant has neglected or refused to deliver. *Markley, receiver, v. Rhodes*, 57.

DIVORCE AND ALIMONY.

1. DIVORCE: ALIMONY: JURISDICTION. Where upon proper notice by publication the District Court obtained jurisdiction of a divorce proceeding, it thereby obtained jurisdiction of the cause for *all purposes*, including the allowance of alimony, so far as the subject-matter out of which the allowance was made was within the jurisdiction of the court. *Twiss v. O'Meara*, 326.

2. _____: _____: ATTACHMENT. In such a case, where an attachment was issued without any statutory ground therefor being stated in the petition and without the execution of an attachment bond, and on the hearing of the cause the attached property was awarded to the divorce plaintiff as alimony: *Held*—

1. That the irregularity in the attachment could not be collaterally attacked by the divorce defendant in a suit against the grantee of the divorce plaintiff to quiet the title to the property.

2. That the only effect of the attachment was to prevent the divorce defendant from alienating the property before a decree could be obtained, and that the title of the divorce plaintiff to the property was based wholly on the decree, and not at all on the attachment.
3. That it was competent for the court to set apart to the divorce plaintiff a specific portion of the divorce defendant's real estate as alimony. *Id.*
3. —————: —————: JURISDICTION: PRACTICE. Where the divorce petition prayed only for such alimony as might be deemed equitable, *held* that the court had jurisdiction to set apart as alimony the specific property, although it was not particularly described and prayed for in the petition. *Id.*
4. MOTION FOR NEW TRIAL ON IRRELEVANT EVIDENCE. The wife had procured a decree of divorce from the husband on the ground of inhuman treatment. The husband asked a new trial on the ground of newly discovered evidence tending to show that the wife's relatives had unduly interested themselves in procuring the divorce. *Held* that, as such testimony would be immaterial to rebut the charge of inhuman treatment, it did not entitle the husband to a new trial. *Harnett v. Harnett*, 401.
5. CONDONATION. The fact that the wife remained in the same house with the husband, and cooked and washed for him until the decree was rendered, did not amount to a condonation of the husband's offense. *Id.*
6. ALIMONY TO PARTY IN FAULT. Alimony is rarely, and only under peculiar circumstances, granted to the party in fault, even when that party is the wife; and, in this case, where the husband was in fault, he being about fifty-eight years old, able-bodied and able to support himself, and having already carried away from the homestead about \$400 worth of property, it was error to grant him \$300 alimony and make it a lien on the homestead, which consisted of forty acres of land bought and improved with the wife's money, held in her name, and worth about \$1,600. The order allowing the husband \$25 as temporary alimony to pay attorney's fees will be permitted to stand, but no lien upon the homestead will be allowed therefor. *Barnes v. Barnes*, 456.

See DOWER, 1.

DOWER.

1. DIVORCE CUTS OFF RIGHT TO. A woman who has been fully divorced from her husband cannot maintain, against that husband's heirs, an action for one-third of the real estate of which he died seized. Such right belongs only to her who is the wife of the deceased at the time of his death. *Marvin v. Marvin*, 699.

EASEMENTS.

See CITIES AND TOWNS, 10.

EMINENT DOMAIN.

See EVIDENCE, 7, 8.

RAILROADS, 17.

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EQUITY.

1. **QUITCLAIM DEED: SUBJECTION OF LAND TO JUDGMENT.** Where P. conveyed to W. the land in controversy, in consideration of the agreement of W. to pay P. & C., and, on these facts, plaintiff, one of the creditors of P. & C., obtained judgment against W. for the amount of P. & C.'s indebtedness to him, *held* that plaintiff had the right in equity to subject the land to the satisfaction of the judgment, and, for that purpose, to follow it into the hands of W.'s wife, who held it by quitclaim deed from W., she not appearing to have paid value for the land. *Kaiser v. Waggoner*, 40.

See CONTRACT, 6, 10, 11.

CONVEYANCE, 1.

FRAUDULENT CONVEYANCE, 6.

ESTATES OF DECEDENTS.

1. **BARRED CLAIM: EQUITABLE RELIEF.** Plaintiff's attorney held a claim of the fourth class against the estate, and, at the request of another attorney, whom he had good reason to believe was authorized to speak for the administratrix, delayed proving the same within the year provided by section 2421 of the Code; but as the delay was slight, and the estate was solvent and unsettled, and there was no counter-equity arising, *held* that these facts entitled plaintiff to equitable relief as against the bar of the statute. *Pettus v. Farrell, Adm'r*, 296.
2. **SALE OF REAL ESTATE: PETITION FOR: JURISDICTION.** In a petition by an administrator *de bonis non* for leave to sell real estate to pay debts, the allegations that no personal property had come into his hands, and that there were debts remaining unpaid, were a sufficient compliance with the provisions of section 2375 of the Revision. (Code, § 2388.) Whether such compliance was necessary to give the court jurisdiction of the cause, *queret*. *Stanley v. Noble*, 666.
3. ____ : ____ : ____ . The law confers upon the Probate Court jurisdiction over the subject-matter of such applications; and where the petition was entertained and a sale consummated thereunder, the court must have determined that the petition was sufficient, and the correctness of such determination cannot be questioned in a collateral proceeding. *Id.*
4. ____ : NOTICE: JURISDICTION. Under section 2376 of the Revision, which provides that before any order can be made for the sale of real estate to pay debts of decedent, "such notice as the court may prescribe must be given to all persons interested in such real estate," *held* that the court had jurisdiction to determine that the notice and the service thereof were sufficient, and that such determination, though erroneous, cannot be attacked in a collateral proceeding. *Id.*
5. ____ : LIMITATION OF TIME: JURISDICTION. The question whether an application by an administrator to sell real estate to pay debts was made in due time is not jurisdictional in its nature. Though the court should have rejected the application as being too late, the error did not render the proceedings and sale void for want of jurisdiction. It should have been corrected on appeal, and cannot be collaterally attacked. *Id.*

ESTOPPEL.

1. FACTS NOT CONSTITUTING. Where D. and P., the legal title holders, mortgaged to the plaintiff a section of land, the half of which had been sold, but not deeded, to J., who was in possession, and the money borrowed on the faith of the mortgage was applied partly to discharge a prior mortgage placed by D. and P., without the knowledge of J., on the whole section, and partly to the payment of certain judgments against D. and J., or P. and J.—the purpose being to discharge the liens against D. and P.—and it appeared that J. had no knowledge at the time that his land was covered by plaintiff's mortgage, and there was no evidence that he knew the manner in which the money borrowed of the plaintiff was to be appropriated, and it was not shown that the appropriation of the money was made through his procurement or upon his request; *held*, that he was not estopped from resisting the enforcement of the mortgage against his land. *Adams, J., dissenting. Waters v. Connally*, 217.
2. PRESUMPTION OF DEATH FROM ABSENCE. Where a mother and her son (the plaintiff) were co-tenants of a city lot, and the mother, believing the son to be dead and herself the sole owner of the lot sold, and undertook to convey it to the defendant's grantor, who, in good faith, improved it, *held* that, although the plaintiff had disappeared and had been absent and unheard of for many years, and was believed by his mother to be dead; and although his mother's grantee purchased and paid for the lot in good faith, expecting to get a clear title to the whole of it, yet plaintiff's conduct was not such, as it appears from the evidence, as to estop him from asserting, as against the defendant, his interest in the lot. *Tice v. Derby*, 312.
3. HUSBAND USING WIFE'S MONEY. Where the wife allowed the husband to invest her money in real estate, thereby enabling him to obtain credit, but such real estate was exhausted in prior debts of the husband, of which the creditors had knowledge when they gave the credit, *held* that the creditors were not prejudiced by the wife's conduct, and that she was not estopped thereby from asserting her ownership of the money. *Jones v. Brandt*, 332.
4. JUDICIAL SALE OF HOMESTEAD. Where on special execution the sheriff (defendant) sold a quarter-section of land belonging to plaintiffs, forty acres of which was their homestead, and, after satisfying the special execution, he in good faith, without notice, claim, objection, or direction by plaintiffs to the contrary, applied the surplus on other executions in his hands, *held* that by thus standing by and allowing the sheriff to so appropriate and pay over the surplus, plaintiffs must be regarded as having abandoned all claim to their homestead rights, if any they had, in the surplus, and cannot now recover such surplus from the sheriff. *Brumbaugh v. Zollinger*, 384.
5. JUDICIAL SALE: REDEMPTION. He who seeks to redeem from a sale thereby affirms the validity of the sale. *Miller v. Ayres*, 424.
6. AGENT'S BOND: RECITALS IN BOND: SURETIES ESTOPPED BY. Where the bond on which the suit was brought recited the appointment of the principal obligor as agent, and specified the duties he was required to perform, for default of which the sureties were liable; *held* that they were estopped, in a suit on the bond, to deny the agency; and it was, therefore, not necessary to prove it by his commission or other writing. *Phoenix Ins. Co. v. Findley et al.*, 591.

See FORMER ADJUDICATION.

JUDICIAL SALE, 3, 9.

EVIDENCE.

1. **JUDGE'S MINUTES ON CALENDAR.** The judge's minutes upon his calendar do not constitute the judgment of the court, and are not the proper evidence of the judgment. *Towle & Roper v. Leacox et al.*, 42.
2. **DEPOSITION: READING PART ONLY.** Where defendants had taken plaintiff's deposition, they were properly allowed, against plaintiff's objection, to read a part of it, without reading the whole, for the purpose of establishing an admission on the part of plaintiff. The plaintiff might have introduced the whole of it, if she had been so advised. *Van Horn v. Smith, Sheriff*, 142.
3. **ADMISSION OF: ERROR WITHOUT PREJUDICE.** When plaintiff had shown by undisputed evidence and without objection that an interlineation was made before he purchased the note, defendant was not prejudiced by the admission of other evidence that the interlineation was in the note soon after plaintiff purchased it, though such evidence was immaterial. *Van Vechten v. Smith*, 173.
4. **PROMISSORY NOTE: PAROL NOT ADMISSIBLE.** Parol testimony that a promissory note was to be paid out of commissions to be earned by the payer as agent of the payee, held not admissible to contravene the terms of the note. *Van Vechten v. Smith*, 173.
5. **HUSBAND AND WIFE: PROHIBITED COMMUNICATION.** The widow of the intestate testified to the transfer of a claim to her by her husband before his death: held not incompetent as disclosing a communication between husband and wife. *Hanks, Adm'r, v. Van Garder*, 179.
6. **FACTS NOT OPINIONS.** Witnesses who are not experts, can be heard to state facts only, not opinions. *Jasper County v. Osborne*, 208.
7. **VALUE OF LAND: TOO REMOTE.** Evidence that some land near by that in controversy was sold ten or twelve years before the trial at a certain price, held too remote to determine the value of the land in controversy at the time it was appropriated. *Everett v. U. P. R. Co.*, 248.
8. _____. When the land in controversy might prudently be laid out in city lots, but in fact is not, evidence as to what its value would be if so laid out is incompetent. *Id.*
9. **ADMINISTRATOR: STATUTE CONSTRUED.** Section 3639 of the Code does not prohibit a witness, introduced by the executor himself, from testifying in favor of the executor as to a personal transaction between the witness and the decedent, even though the witness may be personally interested in the suit. *Leasman v. Nicholson, Ex'r*, 259.
- On REHEARING, held further, that the word "against," in the phrase "against the executor" in the statute, refers to *testimony* against the executor and not to *actions* against him; and that the disqualification of the statute applies alike to actions brought by and against the executor, but only to witnesses introduced to testify against the executor. *Id.*
10. **VARIANCE.** When plaintiff claimed to recover the value of half the hedge, alleging the value of the whole to be \$237.50, and the evidence was that the fence viewers found the value of the half which defendant was required to pay for and maintain to be \$118.50, held no variance between pleading and proof. *McKeever v. Jenks*, 300.
11. **RECEIPT: EXPLAINED BY PAROL.** A writing which is both a receipt and a contract may, so far as it is a receipt, be explained by parol testimony. *Lowe Bros. & Co. v. Young*, 364.

12. **INTENTION PROVED BY CONDUCT.** Where the question was whether or not certain transactions between the parties were intended by them to be in the nature of gambling: *held* that the jury was authorized to find the *intention* of the parties by the course of dealing between them. *Id.*
13. **OF ADVERSE POSSESSION: PAYMENT OF TAXES NOT.** The payment of taxes on a tract of land is not evidence of the adverse possession of it. *Raymond v. Morrison*, 371.
14. **PAROL TO PROVE CONTENTS OF WRITING.** Before parol testimony can be admitted to prove the contents of a written memorandum, it must be shown that the writing itself could not have been introduced. *Minnesota Linseed Oil Co. v. Montague & Smith*, 448.
15. **LETTERS OF INSTRUCTION.** It was error for the court to exclude letters offered by plaintiff, which had been written by plaintiff's officers to defendants, and which tended to support plaintiff's claim that defendants had been instructed to pay out plaintiff's money for flax seed only, that being the very ground on which plaintiff sought to recover. *Id.*
16. **IMPEACHING WITNESS FOR BAD MORAL CHARACTER: STATUTE CONSTRUED.** In section 3649 of the Code, which provides that "the general moral character of a witness may be proved for the purpose of testing his credibility," the word "*character*" means "*reputation*"; and testimony offered which did not relate to the reputation of the witness as to moral character, but was intended to show his moral character as known to the witness, independent of reputation, was *held* properly excluded. *State v. Egan*, 636.
17. **REDUNDANT ALLEGATIONS: PROOF OF NOT NECESSARY.** In an action against the sureties on a sheriff's bond for negligence of the sheriff in failing to levy an execution upon certain property in the possession of the execution debtor, *held* that it was sufficient for the defendants, having admitted that the execution debtor had in his possession certain articles of personal property, to deny that he was the owner of them; and although defendants proceeded to aver with particularity the ownership of each article of such personal property, such averments were redundant, and it was not incumbent upon defendants to prove the same. *Crosby v. Hungerford*, 712.
18. **IMPROPER ADMISSION OF: ERROR WITHOUT PREJUDICE.** Where a fact was established by testimony which is not disputed, the appellant cannot claim to have been prejudiced by the admission of other immaterial testimony tending to establish the same fact. *Id.*

See RAILROADS, 1, 2, 8, 11, 18, 19, 20.

TRIAL DE NOVO, 1.

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DEPOSITIONS, 1.

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See PRACTICE IN THE SUPREME COURT, 8, 13, 14, 15, 21.

FRAUDULENT CONVEYANCE, 3.

VERDICT, 5.

MORTGAGE, 2, 4, 5.

HIGHWAY, 4, 5.

GARNISHMENT, 2.

SPECIFIC PERFORMANCE, 5.

EXCEPTIONS.

1. TO DECREE IN EQUITY: TRIAL DE NOVO. In equitable actions triable anew upon appeal, it is not necessary to take an exception to a decree in order to entitle a party to a trial *de novo* in this court. *Dickens v. Morgan*, 157.
2. TO INSTRUCTIONS: MOTION FOR NEW TRIAL: PRACTICE. Where instructions are excepted to at the time they are given it is not necessary to make further exceptions to them in a motion for a new trial. In such case, no motion for a new trial is required. Code § 3169. *Butterfield & Co. v. Stephens*, 596.

See VENUE, 7.

PRACTICE, 12.

EXECUTION.

1. PRINCIPAL AND SURETY: ABANDONMENT OF LEVY: RELEASE OF SURETY. Where there was judgment against a principal and surety, and execution had been levied on exempt property of the principal, to which levy the principal objected, and the judgment creditor thereupon ordered the property released and the levy discharged, *semble* that such act of the judgment creditor did not discharge the surety. *Green v. Blunt*, 79.
2. INDEMNIFYING BOND: CONSTITUTIONAL LAW: CODE, SECTION 3058, UNCONSTITUTIONAL. An officer who, under an execution, seizes the property of one not the execution defendant is a trespasser, and is liable to the owner of such property in an action for damages; and section 3058 of the Code is unconstitutional in so far as it seeks to bar such an action by the taking and returning by the officer of an indemnifying bond as provided by sections 3055, 3056. The reasoning of *Foule & Roper v. Mann*, 53 Iowa, 42, held applicable and followed. *Craig v. Fowler*, 200.
3. FROM JUSTICE'S COURT: LIMIT AS TO TIME OF ISSUING: STATUTE CONSTRUED. Where a judgment was rendered in a justice's court in December, 1868, less than five years prior to the taking effect of the Code of 1873, and execution was issued thereon in 1877, held that the execution was properly issued and was valid; for, although section 3911 of the Revision, which was in force when the judgment was rendered, provided that in such cases execution should not issue after five years from the entry of the judgment, yet, as the five years had not elapsed when section 3569 of the Code took effect, that section became the law applicable to the case, and extended the time for the issuance of the execution to ten years after the date of the judgment. *Woods v. Haviland*, 476.

4. **LEVY OF ON MORTGAGED CHATTELS: NOTICE TO OFFICERS: INDEMNIFYING BOND.** Where an officer had levied an execution on mortgaged chattels, and the mortgagor gave written notice to the officer that he was the owner of the chattels by virtue of a chattel mortgage, and that he demanded the immediate return of the chattels to the place from which they had been taken by the officer, *held* that such notice was sufficient, under § 9055 of the Code, to render the further possession of the goods by the officer wrongful, and to entitle the officer to demand an indemnifying bond, and to render him liable to a personal action under said section of the Code. *Id.*
5. **DUTY OF SHERIFF TO LEVY: INSTRUCTION.** The court gave the following instruction: "Under said execution the sheriff was bound to levy on the property in possession of the execution debtor, but if he failed to levy thereon, and if the evidence shows that the property was the property of some one other than the execution debtor, then the defendants herein are not liable for the failure, if any, of said sheriff to levy on said property:"—*Held* correct and properly given. *Crosby v. Hungerford*, 712.
6. ———: **MEASURE OF SKILL AND DILIGENCE REQUIRED.** The exercise of such skill and diligence as a reasonable man would exercise in the performance of like duties under the same circumstances, is all that can be required of a sheriff in levying upon property under an execution. *Id.*
7. **NEGLIGENCE OF SHERIFF: ACTION ON BOND: REDUNDANT ALLEGATIONS: PROOF OF NOT NECESSARY.** In an action against the sureties on a sheriff's bond for negligence of the sheriff in failing to levy an execution upon certain property in the possession of the execution debtor, *held* that it was sufficient for the defendants, having admitted that the execution debtor had in his possession certain articles of personal property, to deny that he was the owner of them; and although defendants proceeded to aver with particularity the ownership of each article of such personal property, such averments were redundant, and it was not incumbent upon defendants to prove the same. *Id.*

See **EXEMPTION**, 1, 2, 3.

MORTGAGE, 6.

EXECUTOR.

See **ADMINISTRATOR**.

EXEMPTION.

1. **WAIVED IF NOT ASSERTED: EVIDENCE CONSIDERED.** Where exempt property of an execution debtor has been levied upon, he must, in some way, indicate his intention to rely on his right to hold the property as exempt; otherwise he will be deemed to have waived such right; but upon consideration of the evidence in this case, it was *held* that the execution defendant had sufficiently asserted his intention to hold the property as exempt. *Green v. Blunt*, 79.
2. **FRAUD: COVERING PERSONAL EARNINGS: STATUTES CONSTRUED.** Plaintiff entered into an arrangement with her brother, who was insolvent, whereby she rented a farm of a third person and employed her brother to cultivate it in the use of his farm implements, which were exempt from execution, the object being to enable the brother to employ himself and his implements at a certain rate per month, which would be exempt from execution, rather than rent the farm himself and raise the crops,

which would be subject to execution. *Held* that the transaction was not fraudulent in law, and that the crops could not be subject to the payment of the brother's debts. *Patterson v. Johnson*, 397.

3. **EXECUTION: MONEY DUE FROM BOARDERS.** The money due from boarders for board to a boarding-house keeper who rents a house for such business, furnishes for the use of the boarders the proper chambers, kitchen, dining-room, and other furniture, buys materials for food and has them cooked, employs servants for cooking, waiting upon the table, taking care of the chambers and other purposes, and pays such servants therefor; who assists in and oversees the work about the house, and charges the boarders a stated sum per month, in a lump, for the entire board and lodging thus furnished, is *not* exempt from execution as earnings for personal services, under section 3074 of the Code. *Shelly v. Smith*, 453.

See **TAXATION**, 2.

FEES.

See **WITNESSES**, 1.

FENCES.

1. **PARTITION FENCE: DEFINITION OF.** A partition fence, as contemplated in the statute, means a fence on the line between two proprietors, where there is no road, alley, or something else which would prevent the erection of such fence. *Hewit v. Jewell*, 87.
2. **LANDS USED IN COMMON: WHEN NOT.** A person uses his land otherwise than in common when he segregates it from the adjoining land by the erection of a fence, or by such use of it that he and his neighbor cannot, in the nature of things, use their land in common. *Id.*
3. **LANDS USED SO COMMON: OWNERS MUST ERECT FENCE.** Where neither the plaintiff nor defendant was using his land in common, in a county where stock was not restrained from running at large, either of them could be compelled to join in the erection of a partition fence on the line between their lands. *Id.*
4. **FENCE VIEWERS: JURISDICTION: STATUTE CONSTRUED.** Sections 1490-1492 of the Code, and section 2, chapter 106, acts of 1876, clothe the fence viewers with jurisdiction to decide upon the sufficiency of a hedge and its value, and their decision upon questions within their jurisdiction is conclusive. *McKeever v. Jenks*, 300.
5. **RECOVERY FOR HEDGE: STATUTE CONSTRUED.** The language of section 2, chapter 106, acts of 1876, is not to be so construed as to defeat recovery for the value of one-half of a hedge merely because at some point on the line, on account of the nature of the ground, a hedge could not be grown for short distances. *Id.*
6. **CONSTITUTIONAL LAW: STATUTE AS TO FENCE VIEWERS.** The statutes under which the fence viewers acted in this case are not unconstitutional as depriving persons of their property without due process of law, but were enacted by the legislature in the exercise of its proper authority to provide special tribunals to determine the rights of parties under appropriate rules applicable thereto. *Id.*
7. **APPEAL FROM FENCE VIEWERS: NOT ALLOWED.** The statute has not provided for an appeal from the action of fence viewers to the Circuit Court; and in the absence of such provision such appeal cannot be allowed. Section 162 of the Code does not apply. *McKeever v. Jenks*, 350.

FENCE VIEWERS.

See FENCES.

FORCIBLE ENTRY AND DETAINER.

1. FORCIBLE DETAINER: TENANCY AT WILL: FACTS CONSTITUTING. Where real property was ordered sold under special execution, and the execution defendants had appealed the cause to the Supreme Court, but the execution plaintiff, who purchased the property at the sale, did not demand a sheriff's deed, as he might have done under section 3102 of the Code, but accepted a certificate of purchase subject to redemption, and allowed the defendants to occupy the property, held that defendants were in possession with the assent of the owners, and were tenants at will, and that the action of forcible entry and detainer could not be maintained against them without the thirty days notice required by section 2015 of the Code. *Munson, Adm'r, v. Plummer*, 120.

FORMER ADJUDICATION.

1. EVIDENCE: SUBJECTING LAND TO JUDGMENT. In an action to subject land to the satisfaction of a judgment, evidence as to matters which were adjudicated and concluded by the judgment is immaterial. *Kaiser v. Waggener*, 40.
2. ASSIGNEE BOUND BY. The assignee of a party bound by a former adjudication is also bound thereby. *Goodenow v. Litchfield*, 226.
3. TEST OF. When a former adjudication is relied on as a bar to an action, it must appear, either by the record or by extrinsic evidence, that the particular matter in controversy and sought to be concluded was necessarily tried and determined in the former action. *Id.*
4. ——: RULE APPLIED. In a former action, the plaintiff demanded that the title to certain lands be quieted in him, or, if the defendant should be found to have the better title, that plaintiff should be reimbursed by defendant for taxes paid by plaintiff on the land, and, by agreement of parties, these propositions were specially submitted to the court; the court entered a decree dismissing plaintiff's bill as to the lands; held a dismissal and adjudication of both claims made by the plaintiff. *Id.*
5. NEW CAUSE OF ACTION. An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is pronounced, but in every other where the right or title in controversy is the same, although the cause of action may be different. *Id.*
6. ——: RULE APPLIED. It was accordingly held that a former adjudication in a suit to recover taxes paid on certain lands for certain years, is conclusive in another suit between the same parties and their privies to recover taxes paid on the same land for subsequent years, when the payments for all the years were made in the same right, without any change in the relation of the parties or of the law governing their rights. *City of Davenport v. C., R. I. & P. R. Co.*, 38 Iowa, 688, distinguished. *Id.*
7. DISMISSAL WITHOUT PREJUDICE AS TO PART. Where in the former action the bill was dismissed without prejudice as to a part of the lands, but the gross amount of taxes claimed to be recovered was agreed to have been paid on all the lands, held an adjudication as to the recovery of the taxes paid on all the lands. *Id.*

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8. **EFFECT OF.** A former adjudication estops a party or his privy from afterwards pleading anything which he might have pleaded in the former action. *Id.*
9. **SUCCESSIVE CAUSES OF ACTION.** It is not essential that the successive causes of action should be the same, but when the very matter or thing which it is sought to litigate must have been adjudicated in the prior action, the bar or estoppel is complete. *Id.*
10. ——: **RULE APPLIED.** It was accordingly *held* that, when, in an action to recover taxes paid on land for certain years, a particular question has been adjudicated, such adjudication will be conclusive on the parties and their privies in another action to recover taxes paid for subsequent years, when the subsequent payments were made under precisely the same claim of right and under the same circumstances as the former. **ADAMS and DAY, JJ., dissenting.** *Id.*

See **HIGHWAY**, 1.

PRACTICE IN SUPREME COURT, 12.

PROMISSORY NOTE, 8.

FRAUD.

1. **METHOD OF PROOF: ADMISSIBILITY OF TESTIMONY.** Fraud, and the knowledge of fraudulent designs and transactions, cannot in many cases be proved except by circumstances; and when evidence offered tended to establish facts and circumstances which would have aided in disclosing the real purpose of the parties, it was error to exclude it. *Craig v. Fowler*, 200.
2. **DELAYING CREDITORS: INSTRUCTION.** An instruction to the effect that, if plaintiff held an honest claim against her husband, she could not use it for the purpose of hindering and delaying other creditors, *held* good in substance, though wanting in explicitness. *Id.*
3. **EVIDENCE: INSTRUCTION.** An instruction in substance as follows: "Any fraud of the husband, if any has been shown, in encumbering or disposing of his property, cannot affect the plaintiff, unless she knew of and assented to or aided in it at the time, and, even then, fraud shown in other transactions will not be sufficient alone to show fraud in this one. It can only be considered as showing the general course of dealing of the parties, and as a circumstance bearing on the general probabilities of the case," *held* not erroneous. *Id.*
4. **EVIDENCE: BURDEN OF PROOF.** The burden of proof to show bad faith is on him who alleges it, and *held* that the evidence in this case was not sufficient to establish bad faith on the part of plaintiff's assignee. His conduct was consistent with an honest purpose, and a dishonest purpose should not be presumed. *Raymond v. Morrison*, 371.

See **VENDOR AND VENDEE**, 1.

INTEREST, 1.

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TAX SALE AND DEED, 7.

PROMISSORY NOTE, 2, 3, 8.

EXEMPTION, 2.

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FRAUDULENT CONVEYANCE.

1. **EQUITY OF GRANTOR: SUBSEQUENT JUDGMENTS NO LIEN: REDEMPTION.** Where a party conveys his real estate with the intent to defraud his creditors, the conveyance is absolute as to him, and he retains no equitable interest therein which is the subject of a lien, under our statute, in favor of a subsequent judgment creditor of the grantor; and hence, such judgment creditor has no statutory right to redeem the property from a sale thereof, made under special execution, at the suit of other creditors, who have had the conveyance set aside in a proceeding in equity. *Howland v. Knox*, 46.
2. **— : RIGHTS OF CREDITORS.** When a debtor fraudulently conveys property to defeat his creditors, the creditors may, after judgment, adopt one of two courses: they may, by an action in chancery, subject the property to the payment of their judgments; or they may levy upon the property and sell, and afterwards go into chancery and quiet their title. *Id.*
3. **WHAT CONSTITUTES: EVIDENCE CONSIDERED.** Before a conveyance can be impeached for fraud, actual fraud, or fraud in fact, on the part both of the grantor and grantee, must be shown, and the evidence in this case held not sufficient to establish such fraud. *Jones v. Brandt*, 332.
4. **DELAYING CREDITORS: INTENTION AND RESULT.** To make a debtor's transfer of property fraudulent as respects his creditors, there must be an intent to defraud, express or implied, and an act which, if allowed to stand, will *actually* defraud them by hindering, delaying, or preventing the collection of their claims. Consequently, where a debtor, though with the intent on his part to defraud his other creditors, conveys all his real estate, including his homestead which was not liable for his debt, to one of his creditors for a *bona fide* consideration, exceeding by \$700 the value of the property conveyed, after deducting the value of the homestead and the incumbrances upon the property, held that the grantee had a right, for the purpose of securing his claim, to accept the conveyance, that the transaction did not, in fact, hinder or delay the other creditors of the grantor, and that the conveyance could not be set aside as fraudulent. *Aultman, Miller & Co. v. Heiney*, 654.
5. **PARENTS TO SON.** A father and mother conveyed to their son, who was living with them, all their real estate, for no other consideration than the assumption by the son of certain liens on the land, but the amount of these liens was considerably less than the value of the land: held that the conveyance, so far as the value of the property exceeded the amount of the liens assumed by the grantee, should be held subject to the claims of a creditor whose demands arose prior to the conveyance. *Lyon v. Haddock*, 632.
6. **PREFERENCE OF CREDITORS: RULE IN EQUITY.** The defendant, the M. E. Church, owned the lot in question, on which was situated its house of worship and parsonage. It was indebted to Litchfield, \$122.18, to Lane, \$35, and to Aldrich, \$300. Litchfield had begun an action to recover his claim, but three days before he obtained judgment, the church conveyed to Aldrich, in payment of his claim, that part of the lot on which the parsonage stands, and mortgaged to Lane the other part to secure her claim. Plaintiff claims the property by virtue of a sheriff's deed obtained under the Litchfield judgment, and seeks to set aside the deed to Aldrich and the mortgage to Lane as fraudulent. Under these facts the court held that plaintiff could not recover, because:

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First: The church, in preferring creditors, did not exhaust its property, it appearing that the portion mortgaged to Lane for \$335 was worth at least \$3,000.

Second: The plaintiff does not come into court with clean hands, since he seeks to hold property worth \$3,500 on a sheriff's deed which cost him only \$171.66, and tries to defeat two other creditors holding equally just claims, one for \$335, and the other for \$300. *Robinson v. First M. E. Church*, 717.

7. FROM FATHER TO SON: EVIDENCE CONSIDERED AND CONVEYANCE SET ASIDE. *Dickerman v. Farrell*, 759.

GARNISHMENT.

1. PRACTICE: EXAMINATION OF GARNIShee IN COURT. A garnishee who has answered the statutory questions propounded by the sheriff may, if properly notified to do so, be compelled under the statute to appear before the court or a referee, and submit to a further examination. *Thomas v. Silvers, Hoffman, et al.*, 670.
2. ——: HUSBAND AND WIFE: EVIDENCE. A wife who is garnished on execution against her husband is not excused from answering questions as to whether she is indebted to her husband, or has money or property belonging to him. *Id.*
3. ——: REFUSAL TO ANSWER. Where garnishee, after answering the statutory questions propounded by the sheriff, was summoned before a referee for further examination, and she appeared, but refused to answer, the plaintiff may, under § 2984 of the Code, have been entitled to judgment against her; but since he did not then move for such judgment, or having moved, did not insist upon a ruling on his motion, but procured an order for her appearance in court for further examination, held that, after such order, she had a right to assume that no judgment could be entered against her until such examination had been completed, and such facts had been elicited therefrom as would sustain the judgment. Also held that, upon an appeal to this court from the ruling of the court below, excusing the garnishee from answering further, judgment cannot be rendered here against her, although the rulings of the court below are reversed. *Id.*

GUARANTY.

See PROMISSORY NOTE, 9, 10.

GUARDIAN AND WARD.

1. SALE OF REAL ESTATE: DEFECTIVE NOTICE: JURISDICTION. In a proceeding by a guardian to sell the ward's real estate, there was notice served upon the ward, and, although the service was imperfect, the court found as a matter of record that service had "been duly made as provided by law;" held that the defect in the service of the notice could not be taken advantage of in a collateral proceeding to set aside the title of the purchaser at the guardian's sale. The court was not without jurisdiction as in the case of no notice. *Bunce v. Bunce*, 538.
2. ——: ORDER FOR NOT A JUDGMENT: STATUTES CONSTRUED. A probate order for a guardian's sale is not a *judgment*; and sections 3154 and 3157 of the Code providing for reversing, vacating, and modifying *judgments* have no proper application to such an order. *Id.*

3. ——: STATEMENTS IN PETITION FOR. Under the statute which provides that the real estate of a minor may be sold when necessary for his support or education, it is sufficient, to give the court jurisdiction to order the sale, if such necessity is *alleged* in the petition. *Id.*
4. ——: NECESSITY OF SALE BOND: APPROVAL OF SALE. In a proceeding in probate to sell the real estate of a minor, while it would be error, in the absence of the sale bond required by section 2556 of the Revision, for the court to approve the sale, yet where jurisdiction has attached and the sale has been approved, it cannot be successfully attacked in a collateral proceeding by alleging the want of a sale bond. *Id.*
5. ——: APPROVAL OF SALE AND DEED BY CLERK. Under chapter 86, laws of 1868, by which the clerk was empowered to keep open court, and transact, in the absence of the judge, all probate business not requiring notice, subject to the supervision and approval of the judge, the clerk was authorized, in the absence of the judge, to approve the sale and deed made by a guardian for the real estate of his ward, and where the clerk so approved the sale and deed, and the judge afterwards approved the guardian's *report* of sale, *held* that the approval by the judge of the *report* must have included an approval of the act of the clerk in relation thereto, and was a sufficient approval by the judge of the sale and deed. *Id.*

HABEAS CORPUS.

See CONTEMPT, 1.

CRIMINAL LAW, 8.

HIGHWAY.

1. ESTABLISHMENT OF: IRREGULARITY: RES ADJUDICATA. Where plaintiff agreed to procure for defendant the establishment of a highway, but in the proceedings there was a slight irregularity, and afterwards, in an action against the road supervisor, there was a trial involving the validity of the road, and the opening of the same was perpetually enjoined, *held* that this must be regarded as an adjudication binding upon the public and all persons interested, including the plaintiff, that no road was legally established. *ADAMS, J., dissenting. Dicken v. Morgan*, 157.
2. ESTABLISHMENT OF: REPORT OF COMMISSIONER AGAINST: INJUNCTION. Where, under section 832 of the Revision, the commissioner appointed to examine and report upon the establishment of a highway reported against it, *held* that the board of supervisors had no further jurisdiction of the matter, and that their action in attempting to establish the road was void; *also*, that where, as in this case, there was a threatened invasion of the rights of plaintiffs by the road supervisor in opening the pretended road, plaintiffs might anticipate the injury and prevent it by injunction. *Morgan v. Miller*, 481.
3. RE-SURVEY OF: OBJECT OF STATUTE. Section 964 of the Code does not authorize the board of supervisors to cause a highway to be re-surveyed, when the line of road, as originally surveyed and established, can be traced on the ground by the recorded field notes thereof. *Blair v. Boesch*, 554.
4. ——: OBJECT OF: EVIDENCE. When such re-survey was made, it was competent for the board of supervisors, in considering it, to hear parol evidence as to where the original survey was actually made, and upon

being satisfied that the re-survey was upon the line as originally surveyed, to approve and confirm the re-survey. The very object of a re-survey is to ascertain the location of a road already established. *Id.*

5. — : LIMIT OF AUTHORITY OF SUPERVISORS. The statute authorizing the re-survey of public roads makes no provision for a survey to establish highways acquired by the public by prescription; and it was not within the power of the board of supervisors to vary the line of road as originally surveyed, by taking evidence of adverse possession and user. *Beck, J., dissenting. Id.*

HOMESTEAD.

1. PROCEEDS OF: LIABILITY FOR DEBTS. Whether the proceeds of a homestead shall become liable for debts depends always upon the manner of dealing with it. In this case the husband, who had the title to the homestead, exchanged it for a new homestead and the lot in controversy, but had all the property thus taken in exchange conveyed to his wife:—*Held* no fraud upon creditors of the husband, and they could not subject the lot to the payment of the husband's debts. *Jones v. Brandt*, 332.
2. INCUMBRANCE OF. Where the plaintiff sought to enforce a lien against defendant's homestead, based upon a parol agreement of the wife, who held the legal title, to execute a mortgage on the property, *held* that the petition was properly dismissed, since, under Code, section 1990, no incumbrance of the homestead is of any validity unless it be based upon a written instrument signed by both husband and wife. *Clay v. Richardson*, 489.
3. PART OF BUILDING EXEMPT AS. Defendant owned a two story brick building twenty by eighty feet, with basement, and the part of the lot on which it was built. The front room of the basement had been (but not since the rendition of plaintiff's judgment) used as a barber shop; the first story above the basement, except the stairway and two small rooms constructed by temporary partitions, was occupied as a business room; defendant with his family lived in the building and occupied the whole second story above the basement, and had the sole use of the stairway, and used to some extent for storage the two temporary rooms above referred to on the floor above the basement:—*Held* that the whole second story, the stairway, the basement and the ground, constituted defendant's homestead, but that the first story except the stairway was subject to execution. *Mayfield v. Maasden*, 517.
4. ABANDONMENT OF: FACTS CONSTITUTING. Where a person had a home-stead in the country, but left the same and, with his family, moved to town to engage in the practice of law, intending to reside permanently in town if he succeeded in his practice, otherwise to return to his country home, *held* that these facts showed an intention to abandon the homestead, qualified only by a contingency which the owner intended to avoid, and that the removal from the homestead, with such an intention constituted an abandonment in the contemplation of the law. *Kimball v. Wilson*, 638.
5. CHANGE OF: LIABILITY FOR DEBTS. A new homestead of no greater value than the old one, though purchased in part with proceeds of the old one, and in part with other means, is exempt from the debts of the owner, contracted subsequently to the occupancy of the old homestead. *Lay v. Templeton*, 684.
6. JUDICIAL SALE OF. See *Estopel*, 4.
7. PLATTING OF BY SHERIFF. See *Judicial Sale*, 4.

HUSBAND AND WIFE.

1. PERSONAL PROPERTY OF WIFE: STATUTES CONSTRUED. Where plaintiff gave to her husband money with the understanding that he was to use it to the best advantage, and to account to her for the money, with interest or profit, when required, and he invested in real estate taken in his own name, *held*, that, though it be conceded that the money thereby vested in the husband "in favor of third persons acting in good faith and without knowledge of the real ownership," under section 2499 of the Revision, yet that section had no application to parties who became creditors of the husband after its repeal and the enactment of section 2202 of the Code, and that, as to such creditors, the money did not vest in the husband, but constituted a debt which was a valuable consideration for the conveyance of real estate by the husband to the wife. (This point affirmed on rehearing.) *Jones v. Brandt*, 332.
2. ANTE-NUPTIAL CONTRACT AVOIDED BY WIFE'S DELINQUENCY. Where a woman brought an action against the administrator of her deceased husband to recover an annuity provided in an ante-nuptial contract, and it appeared that she abandoned her husband seven weeks and three days after the marriage, on account of his becoming intoxicated, a habit which he had fully developed and of which she was fully aware when the contract was consummated, *held* that she could not recover, and that her petition was properly dismissed. *York v. Ferner, Adm'r*, 487.

See EVIDENCE, 5.

PAUPER, 4.

ESTOPPEL, 3.

GARNISHMENT, 2.

IMBECILITY.

See INSANITY.

INDEMNIFYING BOND.

See BOND.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

1. ACTION BY NEXT FRIEND: DISMISSAL BY COURT. Where an infant brought an action by his next friend, and the court dismissed the action upon the finding of record that "said action is not being prosecuted for the benefit of said minor, and that the further prosecution of said action is not for the best interest of said minor," *held* that the dismissal was warranted by section 2565 of the Code, and that, in the absence of showing to the contrary, the findings of the court must be presumed to have been made upon sufficient evidence. *Ball, by next friend, v. Miller*, 634.
2. CONTRACT OF: RULE OF LAW. When the court can pronounce the contract of an infant to be to his prejudice, it is void, and when to his benefit, as for necessities, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of

the infant; but that election must be exercised within a reasonable time after attaining majority. *Green v. Wilding*, 679.

3. ——: DISAFFIRMANCE: REASONABLE TIME. What is a reasonable time after majority, under section 2238 of the Code, within which an infant may disaffirm a contract made in infancy, depends upon the circumstances of each case. But as the plaintiff in this case did not attempt to disaffirm her contract except by bringing this action, and did not bring this action until three years and eight months after attaining her majority, and three months after being legally advised that she could disaffirm, held that the action was not brought within a reasonable time. The fact that she was informed by persons not qualified to give legal advice that she could not bring her action until her infant brother became of age, was not, in the eye of the law, a sufficient reason for the delay. *Id.*

See TAX SALE AND DEED, 5.

INJUNCTION.

1. INJUNCTION BOND: ACTION ON: EVIDENCE. In an action for damages on an injunction bond, it was error to render judgment for plaintiff in the absence of evidence that the injunction suit had been disposed of; and the judge's minutes upon his calendar that the suit had been dismissed are not the proper evidence of that fact. Such minutes do not constitute the judgment of the court. *Towle & Roper v. Leacox*, 42.

See HIGHWAY, 2.

INSANITY.

1. IMBECILITY AS A DEFENSE TO MORTGAGE FORECLOSURE: EVIDENCE CONSIDERED. *Peake v. Van Lewven*, 764.

INSTRUCTIONS.

1. INSTRUCTIONS: ALL THE LANGUAGE MUST BE CONSIDERED. Objections to instructions which do not regard all the language used therein will not be considered. *Gronan v. Kukkuck*, 18.
2. PRACTICE: ERROR CURED BY JUDGMENT. Where there was error in neglecting to submit to the jury plaintiff's demand for rent, but the defendant consented to judgment for the highest amount that could have been recovered under the evidence, held that the error was cured by the judgment. *Van Horn v. Smith, sheriff*, 142.
3. ISSUE NOT SUPPORTED BY EVIDENCE. When an issue is tendered by answer, but not supported by any evidence, the defendant cannot be prejudiced by the failure of the court to submit that issue in his instructions to the jury. *Van Vechten v. Smith*, 173.
4. ORDER TO FIND FOR DEFENDANT IS NOT: ERROR WITHOUT PREJUDICE. An order by the court to the jury to bring in a verdict for the defendant, is not an "instruction" in contemplation of the statute requiring instructions to be in writing, and the fact that such order was given orally was, at the most, error without prejudice. *Milne v. Walker*, 186.
5. PRACTICE. It is not error to refuse to give an instruction asked when another instruction given to the jury by the court covers substantially the same ground. *State v. Connor*, 357.

6. **SLANDER: PETITION AND AMENDMENT.** Where in an action for slander there was a petition and an amendment thereto, in both of which slanderous words were charged, and the court in one of its instructions to the jury directed them that the plaintiff, in order to recover, must show that defendant did speak of her "one or more of the different forms or words charged in the *petition*," *held* that, if it were conceded that the word "petition" did not include the amendment, yet under the circumstances of this case (see opinion) the jury could not have been misled by the omission of the word "amendment," and that such omission was no ground for reversal. *Fuchs v. Osweiler*, 431.
7. **NOT SUPPORTED BY PLEADINGS OR EVIDENCE.** Where in an action on a guaranty a settlement and waiver were pleaded, not as independent defenses, and were not in issue as such, and as independent matters they did not constitute a defense, because they occurred before the guaranty was executed, *held* that it was error to instruct the jury as though the issues were formed on these matters, especially as there was no evidence whatever tending to show a settlement, or a waiver of the terms of the contract. *Star Wagon Co. v. Sweeny, Lebo & Co.*, 609.
8. **REPETITION NOT REQUIRED.** It was not error to refuse to give to the jury an instruction asked by a party, when the instruction refused was substantially covered by one given. *Crosby v. Hungerford*, 712.

See JURY, 1, 2.

CITIES AND TOWNS, 3.

RAILROADS, 8, 10, 21.

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PRACTICE IN SUPREME COURT, 21.

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INSURANCE.

1. **LIFE INSURANCE: MUTUAL AID ASSOCIATION: HOW FAR SUBJECT TO STATUTORY CONTROL.** A mutual aid association, organized under section 1160 of Code, for the insurance of its own members from loss by death, sickness, or accident (and the defendant is held to be such an association), need not comply with the provisions and requirements of chapter 5, title 9, of the Code, relating to life insurance companies properly so called. In order to give force and effect to section 1160, the word "every" in section 1161 must be limited to the stock and mutual companies referred to in the sections which follow. *State of Iowa, ex rel. Auditor, v. Iowa Mutual Aid Association*, 125.
2. **—: —: LIABILITY FOR ANNUAL REPORT.** The defendant association was not organized until April, 1881, and was not required to make an annual statement until January 1, 1882:—*Held* that an action begun in August, 1881, to wind up the business of the defendant, could not be sustained, on the ground that it had failed to comply with the law in regard to making an annual report. *Id.*

INTENTION.

1. **PROVED BY CONDUCT.** See Evidence, 12.

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INTEREST.

1. RATE OF. See Agency, 3.

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See CITIES AND TOWNS, 1, 2, 7, 8, 9.

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JUDGMENT AND DECREE.

1. ON SPECIAL VERDICT: POWER OF COURT TO RENDER. See Verdict, 1.
2. PROCURED BY FRAUD: PETITION TO VACATE: QUESTION TO BE TRIED. Where plaintiff petitioned the court to "set aside, vacate and reverse a judgment rendered against him, on the ground of fraud practiced by the defendants in procuring it, and the issues were made up as prescribed under section 3158 of the Code, nothing could be tried but the question whether the judgment should be set aside and vacated; and it was error for the court, upon the trial on such petition, to render judgment against the defendants on the issues in the original cause. *Brown v. Byam*, 52.
3. PREJUDICIAL FRAUD IN SECURING: FACTS CONSTITUTING. The facts constituting the fraud practiced by defendants in procuring the judgment in this case considered, and held so prejudicial to plaintiff as to justify the vacation of the judgment against him. *Id.*
4. CONTROLS OPINION OF COURT. When the decree of a court is at variance with the written opinion, the former controls and determines the rights of the parties. *Goodenow v. Litchfield*, 226.
5. IN BANKRUPTCY: NOT COLLATERALLY ATTACKED. The appointment of one as provisional assignee of a bankrupt by a court having jurisdiction, though irregular and erroneous, is not void, and cannot be attacked in a collateral proceeding. *Raymond v. Morrison*, 371.
6. PERSONAL, ON NOTICE BY PUBLICATION ONLY, VOID. Where notice was by publication only, in an action aided by attachment, though the court might have rendered a judgment *in rem* under which the land in question might have been sold, yet, as the court did in fact render a personal judgment against the defendant, on which the land was sold, held that such judgment was absolutely void for want of jurisdiction, and the sale of the land thereunder was also void. *Smith v. Griffin*, 409.
7. BY BIASSSED COURT: NOT VOID. Where a justice had enough of feeling in a case to contribute to a fund for the procurement of a witness for the prosecution, while it was very reprehensible for him to try the case, yet, as he was not a party to, and does not appear to have had any pecuniary interest in the case, his judgment was not void. *Foreman v. Hunter, sheriff*, 550.

See SPECIFIC PERFORMANCE, 1, 2, 3, 4.

PARTNERSHIP, 9.

GUARDIAN AND WARD, 2.

JUDICIAL SALE.

1. EXECUTION SALE: CONTRACT: RIGHT TO REDEEM. Where a purchaser at an execution sale, after the sale, offered to convey to the execution debtor the land purchased, upon being paid a certain amount within a certain time, which amount the debtor agreed to pay within the time named, if he could raise it, but failed to perform on his part: *held* that these facts would not support an action by the debtor against the purchaser and his grantee to redeem the land. *Tarkington v. Corley*, 28.
2. PURCHASER: NOTICE. A purchaser at sheriff's sale is bound by constructive notice that the legal title is in one not the execution defendant. *Jones v. Brandt*, 332.
3. ——: ESTOPPEL. Plaintiff is not estopped from asserting her title to the property in question because she might have enjoined the sale under which the defendant claims, but did not. She was not bound, in law or equity, to protect defendant by such injunction. *Id.*
4. PLATTING OF HOMESTEAD. When a whole quarter-section was lawfully sold in a body, after having been offered in forty acre parcels, held that the execution defendants were not prejudiced by the failure of the sheriff to make out and plat the homestead. *Brumbaugh v. Zollinger*, 384.
5. SPECIAL EXECUTION: DUTY OF SHERIFF TO FOLLOW DEFENDANT'S PLAN OF DIVISION. Section 3088 of the Code provides that "at any time before 9 o'clock A. M. of the day of the sale, the defendant may deliver to the officer a plan of division of the land levied on, subscribed by him, and in that case, the officer shall sell according to said plan so much of the land as may be necessary to satisfy the debt and costs, and no more," applies to sales under special, as well as under general executions. *Taylor v. Trulock*, 558.
6. DEFENDANT'S PLAN OF DIVISION: DEFINITENESS OF. Where the plan of division furnished the officer by the defendant, under section 3088 of the Code, is such as to be easily intelligible to a person acquainted with the land, and is certain in the sense that it can be made certain, the officer should not disregard it. *Id.*
7. PURCHASER UNDER JUDGMENT SUBSEQUENTLY REVERSED: STATUTE CONSTRUED. Under section 3199 of the Code, which provides that "property acquired by a purchaser, in good faith, under a judgment subsequently reversed, shall not be affected by such reversal," *held* that a purchaser who does not pay the full amount of his bid, but only the costs in the case, is not a purchaser in good faith; nor is the grantee of such purchaser, who pays to his grantor only the money paid by such grantor, in any better position than such grantor; nor can one who acted as the attorney of the judgment plaintiff, both in the court below and in the Supreme Court, and who is chargeable with actual knowledge of the appeal, acquire from such grantee of the original purchaser any better title to the land than such grantee himself had. *O'Brien v. Harrison*, 686.
8. DEFECTIVE SALE: LIEN OF PURCHASER FOR MONEY PAID. Where land was sold on a judgment which was reversed on appeal, though the judgment debtor was allowed to recover the land of the purchaser's grantee in an action for that purpose, yet it was *held* that such grantee should have judgment against the owner of the land for the amount paid the sheriff on the sale. *Id.*
9. DEFECTIVE SALE: ABANDONMENT OF LAND BY JUDGMENT DEBTOR. Where land was sold under a judgment which was reversed on appeal,

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and the purchaser was not a good faith purchaser, the fact that the judgment debtor, after the sheriff's sale, abandoned the land, and removed from it certain buildings, does not estop him to recover possession under his title. *Id.*

See GUARDIAN AND WARD, 1-5.

ESTATES OF DECEDENTS, 2, 3, 4, 5.

ADMINISTRATOR, 1, 3.

JURISDICTION.

1. JURISDICTION: CIRCUIT COURT: DEMURRER. Where an action against an administrator, which might have been brought in probate, is in fact brought in the Circuit Court as an action at law, the court has jurisdiction, and a demurser will not lie. The remedy of the defendant is to move the court to transfer the cause to the probate docket. *Ashlock v. Sherman*, 56 Iowa, 311, followed. *Hutton v. Laws*, 55 Iowa, 710, distinguished. *First National Bank of Garrettsville v. Green*, 171.
2. EXCLUSIVE IN CIRCUIT COURT: ACTION FOR SUPPORT OF NON-RESIDENT PAUPER. Under section 1359 of the Code, the Circuit Court has exclusive jurisdiction of proceedings by one county against another to recover for money expended in support of a pauper whose legal residence was in the latter county. *Cerro Gordo County v. Wright County*, 485.
3. CONSENT OF PARTIES: PRACTICE IN SUPREME COURT. Consent of parties cannot confer jurisdiction over the subject-matter of an action; and the objection that the court below had no jurisdiction may be raised for the first time in this court. *Id.*
4. PROCEEDINGS TO ESTABLISH LOST CORNER: PARTIES. In a proceeding to establish a lost corner of land, a mere statement in the petition that other persons therein named as defendants, besides the one who alone appeared and answered, are interested in the cause, is not sufficient evidence to establish that fact, and, in the absence of such sufficient evidence, the court had jurisdiction to appoint a commissioner to establish the corner as between the plaintiff and the one defendant who appeared, and his report will not be set aside because such alleged interested persons were not before the court, no notice having been served on them. *Nesselrode v. Parish*, 570.
5. JUSTICE'S COURT: AMOUNT IN CONTROVERSY: ATTORNEY'S FEE AS PART OF. In determining the jurisdiction of a justice of the peace, where a question is made as to the amount in controversy, an attorney's fee provided in the note is not to be considered as a part of the amount in controversy, but it is to be treated as costs. Chapter 185, § 2, Laws 1880. *Spiesberger Bros. v. Thomas*, 606.
6. JUSTICE'S COURT: CONSENT OF PARTIES. Where the maker of a note for more than \$100 consented by writing in the body of the note that judgment might be taken thereon before any justice of the peace in Dallas county, held that, although the note was payable in Polk county, yet, as a justice of the peace could have jurisdiction only by consent, and as the consent was limited to justices of the peace in Dallas county, a judgment rendered on the note by a justice of the peace of Polk county was void for want of jurisdiction, and that execution thereon was properly enjoined. *Brown v. Daris*, 641.

7. ——— : PRESUMPTION IN FAVOR OF. While it may be conceded that, under section 3669 of the Code, a decision of a justice of the peace that he has jurisdiction is presumed to be right till the contrary is shown, yet when, as in this case, it appears on the face of the record that he had not jurisdiction, the presumption is rebutted. *Id.*
8. ——— : RESIDENT PARTNERSHIP AND NON-RESIDENT PARTNERS. A partnership may be sued before a justice of the peace of the county where it exists, and service upon a resident partner will give the justice jurisdiction of the partnership, and, upon such service, a judgment against the firm as such may be enforced against the partnership property, and that of such members as have appeared or been served with notice; but where an action is brought for the recovery of money against the members of a firm as individuals, the justice has no jurisdiction to render judgment against a member who resided and was served with notice in another county, except on a written contract for the payment of money in the township where the suit is brought. *Ebersole & Son v. Ware*, 663.

See APPEAL, 1, 3.

FENCES, 4.

DIVORCE, 1, 2, 3.

JUDGMENT, 5.

GUARDIAN AND WARD, 1.

ESTATE OF DECEDENT, 2, 3, 4, 5.

JURY.

1. BOUND BY INSTRUCTIONS OF COURT. The instructions of the jury constitute the law of the case, and must be followed by the jury, whether right or wrong. *Musser & Porter v. Maynard et al.*, 11.
2. VERDICT: CONTRARY TO INSTRUCTIONS: SET ASIDE. The instructions of the court, without inquiry as to their correctness, constitute the law of the case, so far as the jury is concerned; and when the verdict is clearly inconsistent with the instructions, it should be set aside on motion. *Griffith, Adm'r, v. Parton*, 31.
3. ALIEN JUROR: VERDICT BY VOIDABLE, NOT VOID. A verdict rendered by a jury, two of whose members were aliens, is erroneous but not void. It might be reversed on appeal, but it cannot be disregarded as a nullity. *Foreman v. Hunter, sheriff*, 550.

See VERDICT, 2, 4, 5, 6.

PRACTICE, 18.

JUSTICE OF THE PEACE.

See VENUE, 4.

JURISDICTION, 5, 6, 7.

LAND.

1. LOST CORNER: PROCEEDINGS TO ESTABLISH: PARTIES: JURISDICTION. See Jurisdiction, 4.

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2. GOVERNMENT SUBDIVISION: TRUE CORNER OF. The true corner of a government subdivision of land is where the United States surveyors in fact establish it, whether such location is right or wrong, as shown by a subsequent survey. *Nesselrode v. Parish*, 570.

LAW AND FACT.

See NEGLIGENCE, 1.

RAILROADS, 8.

SALE, 1.

LEASE.

1. LESSOR AND LESSEE: MEASURE OF DAMAGES FOR WITHHOLDING LEASED PREMISES. A. was occupying as a store room a building owned by B., under a lease which expired in October, 1882. July 22, 1880, the parties agreed in writing that B. should move the building into the adjoining street, there to be occupied by A. while B. should erect a better building on the site of the old one, which new building he agreed to have completed and turned over to A. by October 15, 1880. B. did not get the new building completed until June, 1881, and then refused to allow A. to take possession of it; but A. by legal measures acquired possession of it June 4, 1881. A. was to hold the new building instead of the old one under the terms of the old lease, until the expiration thereof. Held that the measure of A's damages for the breach of the contract was the market rental value of the new building, less the rent agreed to be paid, from October 15, 1880 to June 4, 1881; and the action of the court below in allowing him the difference in the value of the use of the two places from October 15, 1880, to June 4, 1881, was held erroneous, as involving an inquiry into the extent of A's business, the amount of goods he would probably have sold in the new building, and the profit he would have made thereon—an inquiry too speculative and remote upon which to base a claim for damages. BECK, J., dissenting. *Alexander v. Bishop*, 572.

See CONTRACT, 1, 10, 11.

LESSOR AND LESSEE.

See LEASE.

LEX LOCI CONTRACTUS.

See RAILROADS, 6.

LIEN.

1. PRIORITY OF. See Mechanic's Lien, 4; Mortgage, 3.

2. VENDOR'S LIEN. See Tax Sale, 6.

See AGENCY, 4.

LIFE INSURANCE.

See INSURANCE, 1, 2.

MANDAMUS.

1. **OBJECT OF THE ACTION.** The proceeding by *mandamus* is intended to compel officers and others to act in the discharge of their duties, but not to review their action when discretion may be exercised, or when it depends on facts to be ascertained and determined by them. *Scripture v. Burns*, 70.
2. **SCHOOL DIRECTORS: RENTING SCHOOL-HOUSE: DISCRETION.** School directors may, in a proper case, in the exercise of their lawful discretion, cause the school to be taught in a rented house instead of the public school building, and their action in so doing cannot be reviewed in the proceeding by *mandamus*. *Id.*
3. ——: SECTARIAN INSTRUCTION. Where plaintiff, a private person, sought, by writ of *mandamus* to compel school directors to observe and enforce the law forbidding sectarian instruction in the public schools, *held* that the relief was properly refused, because it did not appear that plaintiff had demanded of the directors the performance of the duty sought to be enforced. Code, section 3378. *Id.*

MECHANIC'S LIEN.

1. **MECHANIC'S LIEN: PAYMENT ON CONTRACT: SUBCONTRACTOR.** Where defendant contracted with T. to build a house and furnish the material, knowing that T. had to buy the lumber for the house of some one, and reserving the right to discharge mechanics' liens, if any should be claimed, and T. bought the lumber of plaintiffs, but defendant did not know that he had bought it on credit, until near the expiration of thirty days from the time the last of the lumber was furnished, when plaintiffs served upon him a notice of their lien, but before that time the contract price had become due and had been paid by the defendant to T., *held* that, under these circumstances, defendant could, in the exercise of reasonable diligence, have discovered that plaintiffs were entitled to a lien, and that the lien must, therefore, be established in an action for that purpose. *Winter v. Hudson*, 54 Iowa, 336, followed, and *Stewart v. Wright*, 52 Iowa, 335, distinguished. *Gilchrist v. Anderson*, 274.
2. **ASSIGNMENT FOR BENEFIT OF CREDITORS.** An assignee for the benefit of creditors has the right to enforce a mechanic's lien existing in favor of the assignors. *German Bank v. Schloth*, 316.
3. ——: CONTRACT WITH PARTNERSHIP: CHANGE OF PARTNERS: TRANSFER OF NOTES: LIEN KEPT IN FORCE. R., D. & H., partners, furnished the machinery for a mill under contract with defendants, S. *et al.*, owners of the mill. Afterwards, and after the most of the machinery had been furnished, R. sold his interest in the partnership property and business to the other partners, D. and H., and M. was taken into the firm. Within a short time after this, D. likewise sold his interest to H. and M., who after that constituted the firm. With each of these changes the firm name was changed, and, at each transfer, the partners remaining assumed all the obligations and liabilities of their predecessors. H. & M. afterwards made a general assignment for the benefit of their creditors to G. Before the machinery of the mill was completed, and during the existence of the firm of R., D. & H., S. *et al.* in consideration of said contract, executed their four notes to R., D. & H., which were transferred by indorsement to the German Bank—two of them as collateral security, and two of them were discounted. Two of these notes were renewed while in the hands of the bank, and made payable to D., H. & M., who then constituted the firm. After the assignment to G., he took up the notes held by the bank, and which had been dishonored by S. *et al.*, in

order to discharge the indorsers, R., D. & H. and D., H. & M. After R. and D. had both transferred their interest in the firm, and after all the materials had been furnished, D. for R., D. & H., made affidavit to and filed their statement of account, claiming a mechanic's lien for R., D. & H. In an action by G., the assignee, to foreclose the mechanic's lien, *held*:

1. That inasmuch as R., D. & H. made the contract with S. *et al.*, from which they were not relieved by the subsequent changes in the firm, R., D. & H. (and D. for them) were authorized to file the claim for, and to perfect their lien.
2. That the lien thus perfected inured to the benefit of H. & M., the holders of the debt. [Miller's Code, § 2139; McClain's Statutes, p. 602, § 13; *Brown v. Smith*, 55 Iowa, 31.]
3. That H., being a member of each successive firm, had all the time an interest in the debt, and a right to security by a mechanic's lien, which right was not limited to his share of the debt, but extended to the whole debt, and was for the benefit of himself and his partners.
4. That G., the assignee of H. & M., might enforce the lien for the amount due on the notes, after the payee had indorsed the notes to the bank, and he had been compelled to take them up after their dishonor by the makers. Following the doctrine of *Farwell v. Grier*, 38 Iowa, 83, and overruling the *dictum* in *Scott v. Ward*, 4 G. Greene, 112, on this point.
5. That although a part of the material was furnished and used after the machinery was running, and was not included in the notes, yet, as it was used to complete and perfect the machinery, and was reasonably within the contract for furnishing the machinery, the assignee was entitled to have the same included in the amount of his lien. *Id.*
4. ————— : PRIOR MORTGAGE: APPLICATION OF PROCEEDS OF PREMISES. Where materials are furnished and used for a building already erected and covered by a prior mortgage, and the whole premises do not sell for more than sufficient to pay off the prior mortgage, the proceeds must all be applied on the prior mortgage, according to the last clause of § 2135, par. 4, Miller's Code (McClain's Statutes, p. 600, § 9, par. 4), which clause must be construed as a *proviso* to the preceding language of the paragraph to which it belongs. *Id.*
5. STATEMENT FOR: FORM OF. Under section 1851 of the Revision, as amended by chapter 111, of the laws of 1862, it was not necessary, in a statement for a mechanic's lien, to set forth the name of the owner of the property at the time the lien was filed. Accordingly it was *held* that, where the owner who had incurred the indebtedness died before the filing of the lien, it was sufficient, as against the heirs, to file the lien against the *estate* of the deceased owner. *Welch v. McGrath*, 519.
6. FORECLOSURE OF: PARTIES TO. In an action to foreclose a mechanic's lien, under sections 1858 and 1859 of the Revision, where the owner who had incurred the indebtedness died before the suit was brought, it was not necessary to make the heirs parties to the suit. A foreclosure against the administrator of the deceased party is just as binding upon his heirs or devisees as would have been a foreclosure against himself during his lifetime. *Id.*

7. ——: STATUTE OF LIMITATIONS WAIVED. Where, in an action to foreclose a mechanic's lien, there were proper parties defendant, who might have plead the statute of limitations, but did not, *held* that the defense was waived, and that it could not afterwards be interposed in a collateral proceeding to defeat the title acquired by the foreclosure proceedings. *Id.*
8. AVERMENTS NECESSARY IN PETITION TO ESTABLISH. Where neither the petition, nor the amendment thereto, contained any averment that the plaintiff performed any carpenter work, or other work, for the defendant, or furnished him any materials, or that there is anything due the plaintiff for such work or materials, there was no foundation for a recovery as for such work and materials, nor for a decree making the amount of such recovery a specific lien on the property in question. *Roberts v. Campbell*, 675.

MINGLING OF FUNDS.

See AGENCY, 4.

MINORS.

See INFANT.

MISNOMER.

1. OF CORPORATION: EFFECT OF. See Railroads, 9, 10.

MISTAKE.

See CONTRACT, 10, 11.

MORTGAGE.

1. CHATTEL MORTGAGE: RECOVERY OF PROPERTY UNDER. One who seeks by virtue of a chattel mortgage to recover the possession of property which he claims is covered by it, must rely on the strength of his own title, and not on the weakness of the title of his adversary. *Eggert & Thoren v. White*, 464.
2. ——: INSUFFICIENT DESCRIPTION: PAROL EVIDENCE TO AID. The description of the property in the mortgage was as follows: "All and the entire crop of flax and wheat and other grain or produce *raised* on the east half, etc," and the year when the same were to be "raised," was not stated; *held* insufficient to put defendants on inquiry as to crops, none of which were "raised," and only five acres of which were sown, at the time of the execution of the mortgage, and that the description could not be aided by parol testimony. *Id.*
3. CHATTEL MORTGAGE: TRANSFER OF MORTGAGOR'S INTEREST: PRIORITY OF CLAIMS UPON. Where the sheriff had possession of a stock of goods for the purpose of selling the same under a chattel mortgage, and before the sale, a writ of attachment in a suit against the mortgagors was placed in his hands, which he levied on the goods subject to the mortgage, and the suit proceeded to judgment, and a special execution issued therein, which was also placed in the sheriff's hands and by him levied on the goods subject to the mortgage, and it was then agreed by and between the mortgagors, the mortgagees, and the attaching creditors, that the goods should be sold in bulk under the mortgage, the mortgage

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satisfied, and the residue applied on the attachment, and the goods were sold accordingly, but before the payment of the purchase money, the sheriff was garnisheed at the suit of plaintiff against the mortgagors: *held*, that the agreement between the mortgagors, the mortgagees and the attaching creditors operated as a transfer of the mortgagor's equity of redemption, and took priority over the subsequent garnishment of the plaintiff. *Phelps v. Winters & Hill*, 561.

4. **EVIDENCE: PAROL TO SHOW THAT BILL OF SALE WAS INTENDED FOR MORTGAGE.** While the authorities are conflicting, the weight of reason, in the opinion of this court, is in favor of the rule, that parol evidence is admissible in an action at law as well as in equity, to show that a bill of sale, absolute on its face, was intended as a mortgage; and in action by the holder of the bill of sale to recover the property, where the bill is not set up in the petition as the ground of plaintiff's claim, the defendant may introduce such parol evidence without pleading the facts in his answer. *McAnnullty v. Seick*, 586.
5. —————: —————: **DEGREE OF EVIDENCE.** While it is true that the rule by which a chancellor governs his own action, in cases in which it is sought by parol evidence to convert a deed, absolute on its face, into a mortgage, is that "the proof should be clear, satisfactory and conclusive," yet it is the established rule of this State that questions of fact, submitted to a jury in civil cases are to be determined by a simple preponderance of the evidence. *Id.*
6. **CHATTEL MORTGAGE: TERMS OF: FORECLOSURE BEFORE DEBT DUE: EXECUTION AGAINST MORTGAGOR.** Where a chattel mortgage provided that the mortgagor might, whenever he chose so to do, take immediate possession of the mortgaged goods and sell the same in satisfaction of the mortgage debt: *held* that the mortgagor might assert the right thus given when the goods were seized by an officer upon execution against the mortgagor, even though the mortgage debt was not then due, and that, after the assertion of such right, there was no interest left in the mortgagor which was subject to execution. *Wells v. Chapman*, 658.

See **SPECIFIC PERFORMANCE**, 4.

ESTOPPEL, 1.

MECHANIC'S LIEN, 4.

REDEMPTION, 1.

EXECUTION, 4.

MUNICIPAL CORPORATIONS.

1. **POWER TO ISSUE BONDS IN SATISFACTION OF JUDGMENT.** Where one G. had obtained judgment against the plaintiff, a municipal corporation, *held, arguendo*, that the plaintiff had power, under section 500 of the Code, to issue its bonds to G. for the amount of the judgment—that this was equivalent to issuing its bonds to borrow money to pay the judgment creditor. *City of Sioux City v. Weare*, 95.
2. **VALIDITY OF BONDS ON THEIR FACE NEGOTIABLE: ISSUED IN SATISFACTION OF JUDGMENT.** Where a municipal corporation has power to bind itself by a written obligation, even if it be conceded that it has not the power to make the same negotiable, and it executes its written obligation, making the same negotiable *in form*, it would not be void; it would result only that the instrument would not *in fact* be negotiable;

and, in this case, where bonds were so issued in satisfaction of a judgment, *held* a sufficient payment of the judgment to support an action against the defendants, on account of whose wrong the judgment had been obtained. *Id.*

3. **CONTRACT OF CHAIRMAN OF STREET COMMITTEE: CITY NOT BOUND BY.** A contract made by the chairman of a street committee is not the act of the committee, and does not bind the city whose council appointed the committee. The general rule is that, where power is entrusted to two or more persons, without an express provision that either one alone may exercise it, it can be exercised only by the concurrent act of at least a majority. *Id.*
4. **—: RATIFICATION BY STREET COMMISSIONER.** The street commissioner, unless he had authority to bind the city by a contract made by him originally, had no power to bind the city by ratification of a contract made by the chairman of the street committee. *Id.*
5. **—: RATIFICATION BY CITY COUNCIL: PRACTICE IN SUPREME COURT.** Where there was no evidence tending to show a ratification of the agreement made by the chairman of the street committee, this court will not consider an objection that the question of ratification was not properly submitted. To constitute such ratification, there should have been, at least, the expressed assent of the majority of the city council; but there appears to be no evidence of such assent. *Id.*
6. **LIABILITY TO, OF PARTY OBSTRUCTING STREET: CONTRIBUTORY NEGLIGENCE OF CITY.** Where a person places an obstruction in the street of a city, he is not in a condition to demand of the city that it shall remove the obstruction at its own expense, if it has knowledge of it, and in case of failure to remove it after such knowledge, that it shall be precluded from looking to him for indemnification, if it is adjudged to pay, and does pay, damages for an injury caused by the obstruction. *Id.*

NEGLIGENCE.

1. **CONTRIBUTORY: LAW AND FACT.** If there are no complicating circumstances, and if the undisputed facts are such that a reasonable mind can draw no other conclusion than that the plaintiff was in fault, it is the province of the court to determine the question as one of law, and it may properly order the jury to return a verdict for the defendant. *Milne v. Walker*, 186.
2. **CONTRIBUTORY.** See Railroads, 2, 23; Cities and Towns, 4, 11, 12; Municipal Corporations, 6.

See RAILROADS, 3, 4, 18, 19.

AGENCY, 2.

CONTRACTS, 13.

CLERK OF COURTS, 1.

SURETY, 2.

SALE, 1.

INDEX.**NEGOTIABLE INSTRUMENTS.**

See **MUNICIPAL CORPORATIONS**, 2.

PROMISSORY NOTES, 6, 11.

NEW TRIAL.

1. **NEW TRIAL: PETITION FOR: ORDER OF PROCEDURE UNDER.** Upon the hearing of a petition for a new trial, under the first subdivision of sections 3154 and 3155 of the Code, the court should first make an order of record granting (in a proper case), a new trial, before proceeding to determine the merits of the original case upon the issues made therein. *Brown v. Byam*, 52.
2. **PETITION FOR: CHANGE OF VENUE.** Where a proceeding was pending to vacate a judgment and for a new trial, under section 3145, subdivision 6, of the Code, it was error for the court to grant a change of venue. The proceedings authorized under this statute are in the nature of a writ of error *coram nobis*, and are provided for the review of a case after final judgment in the very court wherein it was rendered. *Gilman, Adm'r, v. Donovan*, 76.
3. **PETITION FOR: AMENDMENT TO.** Where an insufficient petition for a new trial was filed within the year provided by § 3157 of the Code, and, after the expiration of the year, an amended petition was filed, setting up facts which might be sufficient, *held* that the amended petition could not be regarded as a more specific statement of the original, and did not entitle the plaintiff to a new trial. *Harnett v. Harnett*, 401.
4. **SERVICE BY PUBLICATION: STATUTE CONSTRUED.** Section 2877 of the Code, which authorizes a retrial within two years of all cases where judgment by default has been rendered against one served by publication only, has no application to the case of a judgment void for want of jurisdiction to render it. *Smith v. Griffin*, 409.
5. **MOTION FOR: WHEN MADE.** A motion for a new trial, except on the ground of newly discovered evidence, cannot, under section 2833 of the Code, be made four months after the rendition of the judgment in the case. *Patterson v. Jack*, 632.
6. **NEWLY DISCOVERED EVIDENCE: AFFIDAVIT.** When a motion for a new trial is made on the ground of newly discovered evidence, it must be supported by affidavit. *Id.*
7. **MOTION FOR.** See **Exceptions**, 2.

See **DIVORCE**, 4.

NOTICE.

1. **POSSESSION OF LAND.** The possession of land is sufficient notice to a person taking a mortgage thereon from the holder of the legal title, of the equitable title which the person in possession has in the land. *Watters v. Connelly*, 217.
2. **—: EXTENT OF NOTICE.** Actual possession of a part is legal possession of the whole of a tract of land covered by the title under which the actual possession of the part is taken, and possession of the part will impart notice of the possessor's title to the whole tract. *Id.*

3. OF APPEAL: EFFECT OF. See Practice, 12.
4. OF CONDEMNATION OF RIGHT OF WAY. See Railroads, 16.
 - See JUDICIAL SALE, 2.
 - JUDGMENT, 5.
 - NEW TRIAL, 4.
 - GUARDIAN AND WARD, 1.
 - PROMISSORY NOTE, 9.
 - TAX SALE, 10, 11.
 - ESTATES OF DECEDEDENTS, 4.

NUISANCE.

See CITIES AND TOWNS, 11.

PRACTICE IN SUPREME COURT, 27.

OFFICERS.

See TAX SALE, 3.

ORDINANCES.

See CITIES AND TOWNS, 1, 2, 7, 10.

PARENT AND CHILD.

See PAUPER, 2.

FRAUDULENT CONVEYANCE, 5.

PARTIES.

1. BROUGHT IN BY CROSS-PETITION: PRACTICE. Where certain mortgagees were interested in the identical matter for which the action was brought, and might have been joined as plaintiffs, it was competent for the defendants to bring them in by cross-petition, that the adjudication respecting their title might be complete. *Bunce v. Bunce*, 533.
2. RIGHT TO JOIN GIVES NO RIGHT TO BE SUBSTITUTED. Section 2683 of the Code, which gives to any one interested in the subject-matter involved in the action the right to *unite with* the defendant in resisting the claim of the plaintiffs, does not give to such interested person the right to be *substituted for* the defendant. *Britton v. D. M., O. & S. R. Co.*, 540.

See MECHANIC'S LIEN, 6.

APPEAL, 7.

PARTNERSHIP.

1. DISSOLUTION: PROMISSORY NOTE: EVIDENCE. Where an action was brought against the members of a firm on a note purporting to be executed by the firm, and for answer a general denial was pleaded, *held* that it was error to exclude evidence offered by defendant to show that, prior to the execution of the note, one of the members of the firm had conveyed his interest in the firm property to his copartners; for, while such conveyance could not be held to operate *ipso facto* a dissolution of the firm, it tended to show a dissolution, and, hence, was not immaterial, especially if it should also be made to appear that plaintiff had knowledge of the fact. *Waller v. Davis*, 103.
2. WITHDRAWING OF PARTNER: NEW FIRM UNDER OLD NAME: LIABILITY FOR OLD DEBT. Where articles of copartnership contemplated that a partner might withdraw after six months, and that the remaining partners should pay him for his interest and continue the business, *held* that the withdrawal of one partner dissolved the old partnership, and that the remaining partners constituted a new firm, and that the new firm, though acting under the same name as the old one, could not be bound by a promissory note executed by one of its members for a debt of the old firm, unless, upon the dissolution of the old firm, the new one assumed and became primarily liable for the debts of the old. *Id.*
3. TIME OF PARTNER: CONTRACT CONSTRUED. Where articles of copartnership provided that each partner should give to the business of the firm his whole time and attention, "except such time as may be proper for the fulfilling of the duties of any office or agency held individually by either partner; * * * and neither partner shall accept or continue to hold any office or agency unless by the consent of his co-partner;" *held* that the exception applied not only to offices and agencies held by individual partners at the time of the formation of the partnership, but also to offices and agencies held by a partner at any time during the continuance of the partnership, and the partner so holding any such office or agency was alone entitled to the profits thereof. *Starr v. Case*, 491.
4. ACCOUNTING BETWEEN SURVIVORS AND ESTATE OF DECEASED PARTNER. The surviving partners, in an action against the administrator of a deceased partner, cannot have money, which the decedent in his individual capacity held for the use of a third person, appropriated to the payment of a debt owing by such third person to the firm; not, at least, without making such third person a party to the action. *Id.*
5. ——: APPROPRIATION OF PAYMENT. Where the firm of S., P. & H. was dissolved by the death of P., and C. was owing the firm and was also owing S. & H., and money came into the hands of S. & H. to the credit of C. from the sale of a judgment out of which a part of the account of S. P. & H. arose, *held* that, since neither C. nor S. & H. had made any application of the money, the law would apply it on the debt due S., P. & H., that being the oldest debt. *Id.*
6. ——: DUTY OF SURVIVOR. It is sufficient that the surviving partners, in settling the affairs of the partnership, act in good faith and with reasonable diligence; and the fact that money came into their hands to the credit of persons who were owing the firm, did not make it obligatory on them to retain out of such money enough to satisfy the debts due the firm, though they might have done so. *Id.*
7. ——: COMPENSATION OF SURVIVORS. Surviving partners are not entitled to compensation for settling the affairs of the partnership; and the survivors of a *legal* firm are not entitled to compensation for *legal* services rendered in the collection of claims due the firm. *Id.*

8. ——: USE OF FIRM PROPERTY. Surviving partners are entitled to the exclusive possession and management of the partnership property for the purposes of settling up the partnership business; and, in case of the dissolution by death of a firm of lawyers, it was error to charge the survivors for the use of the firm library pending the settling of the partnership affairs. *Id.*
9. ——: FORM OF JUDGMENT. In an accounting before the court between the surviving partners and the estate of a deceased partner, it was error to render judgment against the survivors *jointly*. The judgment should have been against them *severally*, proportioned to their several liability. *Id.*
10. ——: APPORTIONMENT OF COSTS. In this case—an action for an accounting between surviving partners and the estate of a deceased partner—each party was adjudged to pay the costs and fees of his own witnesses, and such part of all remaining costs including costs of appeal, as is proportioned to his interest in the firm. *Id.*
11. DISSOLUTION OF: CONFLICTING TESTIMONY CONSIDERED IN DETERMINING THE RIGHTS AND LIABILITIES OF VARIOUS PARTIES. *Richards v. Burden*, 723.

See MECHANIC'S LIEN, 3.

PROMISSORY NOTE, 10.

JURISDICTION, 8.

PAUPER.

1. IN CITY: WHO MAY ORDER AID FOR: STATUTE CONSTRUED. When, under section 1361 of the Code, the board of supervisors has appointed an overseer of the poor for a city, such overseer has exclusive control of the poor of such city, and the township trustees have exclusive control of the poor in the township outside of the city, and in such case the county is not liable for aid rendered a city pauper on the order of the township trustees. *Hoyt v. Black Hawk County*, 184.
2. MAINTENANCE BY SON. The son of a poor person, unable to maintain himself by work, is liable to the county for money expended in support of such poor person upon the order of the township trustees, and may be compelled by order of court to support him. *Jasper County v. Osborne*, 208.
3. WHO IS. Although a man has a homestead right in forty acres of land, and is the owner of certain personal property kept on said land, yet if he is aged, infirm, and otherwise destitute, and unable to maintain himself by labor, and his homestead and personal property are in the control of his wife and children, who, by their cruel and inhuman treatment, make it impossible for him to live at home, or, without litigation, to control or enjoy his personal property, he is a "poor person" in contemplation of the statute. *ADAMS and SEEVERS, J.J.*, from their views of the evidence, dissenting. *Id.*
4. ACTION FOR MAINTENANCE. While the wife of such a person is liable to the county for his support, or to any citizen who might take care of him, yet the county may waive its right of action against her and pursue its remedy against the son. *Id.*
5. EMPLOYMENT OF PHYSICIAN FOR: BOARD OF SUPERVISORS CONTROL TOWNSHIP TRUSTEES. When the board of supervisors, in a county where there is no poor house, employed a competent physician to attend

all the poor of the county, the trustees of the township in which such physician resided might not disregard such employment, and employ other physicians to render such services within their township, and thereby bind the county to pay for the services of such other physicians. *Mansfield v. Sac County*, 694.

See JURISDICTION, 2.

PAYMENT.

1. APPROPRIATION OF. See Partnership, 3.

PLEADING.

1. PETITION IN REPLEVIN: ALL CONSTRUED TOGETHER. All the allegations of a petition must be considered together, and if, when so considered, it appears that a good cause of action is not presented, a demurrer will lie. *Houghtaling v. Hills*, 287.
2. MOTION TO STRIKE PART OF ANSWER. Where plaintiff alleged that defendants were to pay out certain moneys deposited with them on the order of one V., plaintiff's agent, for *flax seed* only, and defendants for answer alleged that they were authorized to pay out the money on V.'s order pertaining to the business of his agency *without restriction*, it is plain that, under the contract set up by defendants, they were authorized to pay V., upon his order, sums actually due him as commissions upon his purchases, and an allegation in the answer that there was a sum actually due V., and that defendants paid the same, was proper, and the court properly refused to strike it out on plaintiff's motion. *Minnesota Linseed Oil Co. v. Montague & Smith*, 448.
3. PRACTICE: REPETITION OF BAD PLEA. Where the first answer was held bad on demurrer, and the second count of the substituted answer differed from the first answer only in the addition of a few allegations which were immaterial, the said second count was properly stricken out on motion. *Phenix Ins. Co. v. Findley*, 591.
4. RELIEF LIMITED BY. See Practice, 15.
5. FAILURE TO PLEAD IN TIME. See Practice, 11.

See TORTS, 1.

MORTGAGE, 4.

MECHANIC'S LIEN, 8.

POSSESSION.

See NOTICE, 1, 2.

CRIMINAL LAW, 12.

PRACTICE.

1. EXCLUDING ANSWER OF WITNESS: ERROR NOT PRESUMED. The fact proposed to be established, or the evidence intended to be elicited, by a question, must appear, in order to justify the conclusion that the ruling of the court in refusing permission of the witness to answer it was prejudicial error. *Gronan v. Kukkuek*, 18.

2. **INSUFFICIENT PETITION: ADVANTAGE TAKEN OF, HOW.** If the facts stated in the petition do not entitle plaintiff to relief, and defendant fails to demur, advantage may be taken of the defect by motion in arrest of judgment, or the court may, at the trial, as in this case, direct the jury to find for the defendant. *Smith v. B., C. R. & N. R. Co.*, 73.
3. **ON PETITION FOR NEW TRIAL: CHANGE OF VENUE.** See New Trial, 2.
4. **MUNICIPAL BONDS: VALIDITY OF NOT TRIABLE IN COLLATERAL PROCEEDING.** Where defendants had obstructed plaintiff's street, whereby G. was injured, and plaintiff sued defendant to recover the amount of a judgment which G. had procured against plaintiff on account of such injury, which judgment plaintiff had satisfied by issuing to G. its negotiable bonds for the amount of the judgment, and defendants, for an amendment to their answer, set up that the bonds constituted no satisfaction or payment of the judgment, because they were invalid for want of authority in plaintiff to issue them, held that the amendment was properly stricken out on plaintiff's motion, because the validity of the bonds could not thus be tried in a collateral proceeding. *City of Sioux City v. Weaire*, 95.
5. **ORDER OF ARGUMENT: DISCRETION OF COURT.** Where, upon the principal issue in the case, the burden of proof was on the defendant, the order of argument rested largely in the discretion of the court; and the fact that defendant was allowed to open and close the argument is no ground for reversal. *Van Horn v. Smith, sheriff*, 142.
6. **DISMISSAL OF ACTION: STATUTE CONSTRUED.** Sections 2844 and 2845 of Code of 1873 apply equally to actions at law and suits in equity, and thereunder it is not competent for the court, on its own motion, to dismiss a cause in equity without prejudice, after it has been finally submitted on the evidence. In such case the defendant is entitled to a decision upon the merits, so that the judgment may bar another action for the same cause. *BECK, J., dissenting. Forsythe v. McMurtry*, 162.
7. **ERROR WITHOUT PREJUDICE.** When the very issues excluded by sustaining a demurrer, though erroneously, to one count of an answer, were pleaded in another count, and presented to the jury by proper instructions, and a special verdict was rendered thereon, held error without prejudice to the defendant, and no ground for reversal. *McKeever v. Jenks*, 300.
8. **RELIEF LIMITED BY DEMAND.** The court should not grant to either party, plaintiff or defendant, relief in any respect greater than he demands. *Tice v. Derby*, 312.
9. **EXAMINATION OF WITNESSES: DISCRETION OF COURT.** The latitude to be allowed in the examination of witnesses depends largely on the circumstances of the case and rests, to some extent at least, in the discretion of the court. In this case, where the witness introduced by plaintiff indicated a strong purpose to sustain the validity of the transaction on which plaintiff relied, held no error to allow great latitude in cross-examination. *Love Bros. & Co. v. Young*, 364.
10. **SUBSTITUTION OF PARTY PLAINTIFF.** When an action was brought in the name of the township as plaintiff, and the defendant appeared and demurred on the ground that the township had no legal capacity to sue, and the demurrer was sustained, held that it was not error, under section 2689 of the Code, to allow the clerk of the township to be substituted as party plaintiff by amendment to the original petition. *Wells, Clerk of Washington Township, v. Stomback*, 376.

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11. **FAILURE TO PLEAD IN TIME.** Defendant, by agreement, was ruled to answer in thirty days; he failed to do so, and plaintiff moved for judgment by default:—*Held* that under the circumstances (see opinion) the motion was properly denied. *Redfield v. Miller*, 393.
12. **EXCEPTIONS: NOTICE OF APPEAL.** Where, during the trial, numerous exceptions were taken to the rulings of the court, many of them to the giving and to the refusing to give instructions, and on June 21st there was a verdict and judgment for plaintiff, but no formal exception entered at the end of the judgment entry, and on June 24th defendant filed a motion to set aside the verdict and for a new trial, setting out the errors complained of pending the trial, and also that the verdict was not supported by sufficient evidence and was contrary to law, which motion was, on June 27th, overruled, to which ruling defendant at the time excepted, *held*:
 1. That the exception taken to the ruling denying a new trial was a sufficient exception to the judgment.
 2. That a notice of appeal from the *judgment* rendered on the 21st day of June properly brought up in the Supreme Court all the objections properly saved on the trial of the case, including the motion for a new trial. *Gulliver v. C., R. I. & P. R. Co.*, 418.
13. **INSTRUCTIONS: FRAUD.** Where fraud in procuring a written contract of settlement was pleaded to avoid the effect of the writing, but the facts proved did not constitute fraud, the court should, when requested, have instructed the jury that there was no evidence of fraud. *Id.*
14. **SPECIAL INTERROGATORIES.** When defendant requested the court to submit to the jury special interrogatories, few in number, easily understood and not tending to confusion, which called for answers to ultimate facts in issue, and which were not vulnerable to any valid objection, the request should have been granted. *Id.*
15. **RELIEF LIMITED BY PLEADINGS.** Relief can be granted alone on the case made in the pleadings: *held*, accordingly, that, as plaintiff can have relief only by the setting aside of a judicial sale, which sale she has not attacked in her petition, she cannot have the relief demanded in this case. *Welch v. McGrath*, 519.
16. **NEGLIGENCE OF CLERK: ACTION DISMISSED FOR.** A motion was made to dismiss plaintiff's action because the clerk had failed to make a memorandum in the appearance docket of the date of filing the petition, and the court sustained the motion: *held* properly sustained, under section 200 of the Code, which provides that no pleading of any description shall be considered as filed until such memorandum is made. *Nickson v. Blair*, 531.
17. **DIRECTIONS OF COURT TO WITNESS.** It is not improper for the court, on its own motion, to indicate to a witness what matters should be considered in answering a question, nor, when objections are made to questions asked a witness, to state what the court deems the proper course to be taken. *Britton v. D. M., O. & S. R. Co.*, 540.
18. **QUESTIONS TO JURY: DISCHARGE WITHOUT ANSWER.** Where the court submitted to the jury at the instance of the defendant a question, the answer to which could have determined nothing material to the case, and then discharged the jury against defendant's objection, without requiring them to answer the question, held no error to justify a new trial. *Dreher v. I. S. W. R. Co.*, 599.

19. WRIT OF ERROR: NO PRESUMPTION WHERE RECORD IS SILENT. A writ of error requires only so much of the record to be certified as is necessary to secure a correction of the error complained of; and no presumption can be indulged in reference to a point about which the portion of the record so certified is silent. *Spiesberger Bros. v. Thomas*, 606.
20. APPEAL: ORDER TO LOWER COURT TO APPORTION COSTS: FAILURE TO MOVE THE COURT. Where a judgment including costs is reversed, and the decree of the appellate court directs the court below to make an equitable apportionment of the costs in that court, and reserves to the defendant the right to move at the next term for such apportionment, this decree clearly implies that the original judgment for costs is not left standing, and the neglect of the defendant to move the court for an apportionment of the costs will not have the effect to keep the original judgment for costs against him in force. *O'Brien v. Harrison*, 686.
21. INTERROGATORIES TO JURY: DUTY OF PARTY PROPOSING. The statute is imperative that a party proposing to submit to the jury special interrogatories shall submit the same to the attorney of the adverse party *before the argument is begun*. It is not sufficient that they be submitted to the court; and the court did not err in refusing to submit to the jury interrogatories which had not been submitted to the adverse attorney within the time provided by statute. *Crosby v. Hungerford*, 712.

See VERDICT, 2.

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PARTIES, 1.

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PRACTICE IN SUPREME COURT.

1. COSTS OF AMENDED ABSTRACT. Where the cause was reversed in the Supreme Court, and the abstract of appellant does not seem to have been prepared in bad faith, in order to throw the burden of preparing an additional abstract on the appellee, but, on the contrary, the appellant's abstract fairly presented the question to be determined, a motion to tax the cost of printing appellee's additional abstract to the appellant must be overruled. *Brown v. Byam*, 52.
2. ——: UNLAWFUL CHANGE OF VENUE: SUBSEQUENT PROCEEDINGS NOT REVIEWED. Where this court has determined that an order granting a change of venue was without authority of law, it will not go farther, and review the unauthorized proceedings in the case subsequent to the change of venue. *Gilman, Adm'r, v. Donoran*, 76.

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3. —————: POINTS NOT MADE BY COUNSEL. While we are not authorized to decide a case upon a point not made by counsel, we are not required to disregard a valid objection, simply because we cannot concur in the *reasons* assigned for its support by the counsel who urged it. *Id.*
4. PARTIAL ABSTRACT OF EVIDENCE. Where the abstract does not show that it contains all the evidence, and the appellee moves to dismiss the appeal on that ground, the motion must be sustained. *Green v. Ronen*, 88.
5. NO JUDGMENT APPEALED FROM: APPEAL DISMISSED. This court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken, and the judgment must be affirmatively shown; and, in the absence of such showing, the case will be dismissed, even though the parties fail to raise the objection; for, being jurisdictional in its nature, the parties cannot waive it by silence or consent. *Id.*
6. TRIAL DE NOVO: NO QUESTION OF LAW AND NO INJUSTICE TO APPELLANT: JUDGMENT AFFIRMED. On an appeal from an action in chancery to settle a partnership, triable *de novo* in this court, where there is no point of law involved and the judgment does the appellant no injustice, the judgment will be affirmed. *Barnard v. Coppess*, 85.
7. ARGUMENT NOT FILED IN TIME. It is not the practice to strike from the files an argument not filed in time; but in such a case, when the court is asked (and not otherwise) the costs of such argument will be taxed to the party filing it, unless the delay in filing has been reasonably excused. *Renwick v. Bancroft*, 116.
8. TRIAL DE NOVO: OBJECTIONS TO EVIDENCE. In a trial of a cause *de novo* the Supreme Court will not consider objections to the admission of testimony made in the court below. *Hanks, Adm'r, v. Van Garder*, 179.
9. MOTION TO SUPPRESS DEPOSITION NOT ENLARGED. When a motion is made by plaintiff in the court below to suppress *one* part of a deposition on one ground, he cannot under cover of that motion be heard to argue in the appellate court that *another* part of the deposition was inadmissible and should have been suppressed on *another* ground. *Id.*
10. MOTION NOT RULED ON DEEMED WAIVED. When a motion to exclude testimony or to suppress a deposition is made in the court below, but does not appear to have been ruled on, the appellate court will deem the motion to have been waived. *Id.*
11. OBJECTION NOT RAISED BELOW. A defense not pleaded and an objection not raised in the court below, cannot be heard for the first time in the Supreme Court. *Jasper County v. Osborn*, 208.
12. OBJECTION TOO LATE. After a cause has been submitted, determined, and a rehearing granted, it is too late to raise for the first time, in an argument for rehearing, the objection that a former adjudication of the question in issue is void for want of jurisdiction in the court rendering the former judgment. *Goodenow v. Litchfield*, 226.
13. VERDICT AGAINST EVIDENCE. This court cannot say that a verdict should have been set aside as being against the evidence when the evidence is conflicting and is not all before the court. *Everett v. U. P. R. Co.*, 243.

14. REJECTION OF EVIDENCE: ERROR MUST BE SHOWN. Where evidence is rejected by the trial court, this court will presume that it was properly rejected, unless the contrary affirmatively appears from the record. *Id.*
15. EVIDENCE: IN LAW ACTION TRIED TO COURT. When an action not triable *de novo* in the Supreme Court is tried to the court below without a jury, and evidence is improperly admitted against objection, it must be presumed that the court considered such evidence, and its admission will be ground for reversal. *Leasman v. Nicholson, Ex'r.*, 259.
16. COURT LIMITED BY RECORD. This court cannot consider an objection when the record does not contain the facts necessary for its determination. *State v. McIntire*, 254.
17. RELIEF LIMITED BY THE RECORD. While in this case it would *seem* that a judgment more favorable to plaintiff ought to have been rendered, yet, as he does not appeal, and makes no complaint, this court cannot inquire into the correctness of the amount of the judgment. *Ballou v. Lucas, Adm'x*, 22.
18. ABSTRACT NOT OBJECTED TO DEEMED CORRECT. When a party has served an amended abstract on an opposite party, who has made no response thereto, such abstract must be deemed correct. *State v. Clapper*, 279.
19. INDICTMENT: PRESUMPTION IN FAVOR OF LOWER COURT. When, for some reason not disclosed by the record, an indictment was set aside, and the cause referred back to the same grand jury, the action of the court must be presumed to be correct. *Id.*
20. ASSIGNMENT OF ERRORS. An assignment of error in these words: "The court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against the defendant," held not sufficiently specific under Code, § 3207. *Hoefer v. City of Burlington*, 281.
21. EVIDENCE AND INSTRUCTIONS: ERROR WITHOUT PREJUDICE. Objections to the admission of evidence and to the giving of instructions will not be considered, when the result could not have been changed by the exclusion of the evidence and the withholding of the instructions complained of. *Langford & Orton v. Ottumwa Water Power Co., garnishee*, 283.
22. OBJECTIONS NOT ARGUED. Where counsel fail to present in argument objections to the rulings of the trial court in refusing instructions, this court will not consider such objections. *McKeever v. Jenks*, 300.
23. DEFENSE NOT MADE BELOW WAIVED. Matter of defense which was not presented to the trial court must be deemed to have been waived, and cannot first be urged in this court. *Id.*
24. VERDICT: EVIDENCE TO SUPPORT. The evidence in this case being considered and found to be conflicting, this court will not interfere with the judgment rendered on the verdict. *Martin v. C. I. R. Co.*, 411.
25. MOTION TO DISMISS APPEAL. The appellant having in this case shown by affidavit that the grounds on which was based a motion to dismiss the appeal are not true, held that the motion must be overruled. *Cerro Gordo County v. Wright County*, 485.
26. TRIAL DE NOVO: TIME FOR CERTIFYING EVIDENCE: STATUTE CONSTRUED. In this case, decree was entered April 4, 1881, the evidence was certified by the trial judge August 1, 1881, and the cause was submitted to the Supreme Court April 21, 1882. Held that the evidence

- was certified in time to entitle appellant to a trial *de novo*, under Chap. 35, Laws of 1882, which took effect March, 10, 1882, and which provides that the evidence may be certified at any time within the time allowed for taking an appeal, and which is, by its terms, made applicable to all causes not already submitted to the Supreme Court. *Starr v. Case*, 491.
27. **SUSTAINING PART OF JUDGMENT.** Where under an ordinance there was a judgment imposing a fine upon defendant for maintaining a nuisance, and an order was appended for the abatement of the nuisance at his costs, this court, being obliged to reverse the judgment as to the fine, cannot sustain the order for the abatement, which was merely incidental to the penalty. *Incorporated Town of Nevada v. Hutchins*, 506.
28. **ABSTRACT DEEMED CORRECT.** Where appellee does not present any additional abstract amending the abstract of appellant, this court must accept the abstract of appellant as correct, and what appears on the face thereof, to be true. *Gates v. Brooks*, 510.
29. **BILL OF EXCEPTIONS NOT SIGNED AND FILED IN TIME.** Where the appellant's abstract fails to show that the bill of exceptions was signed and filed during that term, or that the time to do so was by consent extended beyond the term, such bill will be stricken out in this court on motion, especially when appellant's counsel appear to have been served with notice of the motion, but take no notice of it in argument. *Id.*
30. **PASSING ON CONSTITUTIONALITY OF A STATUTE.** When the appellant, for the first time in his argument in reply, contends that a statute is unconstitutional, the argument comes too late to be considered by this court. Appellee should have had an opportunity to answer the argument. It is only after the fullest argument, and the most mature consideration, that this court will pass upon so important a question. *Id.*
31. **QUESTION NOT RAISED BELOW: COSTS.** A party aggrieved by the taxation of costs should move in the court below to have the same re-taxed. When appellant failed to make such motion, or, if he did make it, failed to assign error as to the ruling thereon, he cannot be heard in regard thereto in this court. *Id.*
32. **ERROR WHICH MIGHT HAVE BEEN CORRECTED BELOW.** Where it appeared on cross-examination that a witness, on the examination in chief, took into consideration improper matters in estimating damages, defendant should have moved the court to strike out the objectionable evidence before asking this court to correct the error. *Britton v. D. M., O. & S. R. Co.*, 540.
33. **ERROR WITH ONLY NOMINAL PREJUDICE: NO GROUND FOR REVERSAL.** In this case, the third count of appellant's answer was held bad on demurrer in the court below. If that count was good for anything as a defense (which this court considers very doubtful) it was good only for a nominal sum; and this court will not reverse a case to allow the appellant to recover nominal damages to which he shows that he is entitled. *Phoenix Ins. Co. v. Findley*, 591.
34. **EVIDENCE NOT CERTIFIED.** Where the plaintiff does not show that the evidence is all certified, this court cannot hold that the verdict was not supported by the evidence; and a statement in the abstract that "the record here abstracted contained all the evidence," is very far from saying that the abstract contains all the evidence. *Id.*
35. **QUESTION NOT BROUGHT UP.** Where plaintiff does not assign an instruction as error, and defendant does not appeal, the correctness of the instruction cannot be made a subject of inquiry in the appellate court. *Star Wagon Co. v. Sicezy, Lebo & Co.*, 609.

36. **IRRELEVANT MATTERS NOT CONSIDERED.** Where the appeal was from an order sustaining a motion to strike out part of an "amended and substituted petition," the appellate court cannot consider the *original* petition and an *amendment* thereto, parts of which are set forth in the argument. *Maxwell v. Graves*, 613.
37. **QUESTION NOT PASSED ON BELOW.** This court will not entertain a question which was not passed upon in the court below. *Id.*
38. **ABSTRACT NOT DENIED TAKEN AS TRUE.** When the appellee files an additional abstract, which is not controverted by the appellant, such additional abstract will be deemed correct and taken as true, unless the appellant files a paper, expressly notifying the court that there is a controversy requiring determination. But this rule is not to be understood as applicable to a case where the appellant's abstract states that it is an abstract of all the evidence, and appellee's abstract denies the truth of such statement. *Burkhart v. Ball*, 629.
39. **DEFECTIVE ABSTRACT OF EVIDENCE: PRESUMPTION IN FAVOR OF TRIAL COURT.** Defendant insisted that plaintiff's claim to the land in question was defected by the return on a certain execution which the abstract says was introduced in evidence, but which does not appear in the abstract of evidence before this court. Said execution and return, however, defendant says, appear in the abstract as an exhibit to his answer. *Held* that the exhibit to the answer, though not denied by plaintiff, could not be accepted as evidence, and that, it not appearing to this court what is contained in the return referred to, it must be presumed that it contained nothing inconsistent with the judgment rendered by the trial court. *Kimball v. Wilson*, 638.
40. **POINT NOT MADE BELOW NOR ARGUED ON APPEAL.** Where the point involved in a question certified on appeal to the Supreme Court does not appear from the record to have been made in the court below, and is not argued on appeal, it will not be considered. *Ebersole & Son v. Ware*, 663.
41. **ABSTRACT: BILL OF EXCEPTIONS.** Where appellant's abstract contains matter which it could not properly contain unless a bill of exceptions had been filed by him, this court will regard the appellant as claiming that such bill of exceptions was filed, and the abstract will not be stricken from the record on appellee's motion, simply because it does not state that a bill of exceptions was filed. If in fact no such bill was filed, appellee should have taken advantage of the omission by setting it up in an additional abstract. *Thomas v. Silvers, Hoffman et al.*, 670.
42. **ABSTRACT NOT CONTROVERTED DEEMED TRUE: TRIAL DE NOVO.** Where appellant's abstract stated that it contained all the evidence, and appellees, though filing an additional abstract purporting to set forth the evidence, did not, until the argument, claim that the evidence was not all before the court, and that, therefore, the case was not triable *de novo*, *held* that the objection was raised too late, and that the court must regard the appellant's abstract as supplemented by that of the appellees, as containing all the evidence, and that the case must be tried *de novo*. *O'Brien v. Harrison*, 686.
43. **RE-HEARING: QUESTION TO BE TRIED.** A re-hearing of a cause by the Supreme Court is a new trial regardless of the former opinion of the court; and the essential question is not whether the former opinion shall be adhered to, but whether the judgment of the court below shall be affirmed. *Richards v. Burden*, 723.

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- 44.** ——: COURT EQUALLY DIVIDED. Hence, when the court, on the re-hearing of a cause is equally divided as to whether the judgment of the lower court should be affirmed, that judgment stands affirmed by operation of law, and that regardless of the fact that the Court in its first opinion may have thought the judgment should be reversed. BECK, J., dissenting. *Id.*

See TRIAL DE NOVO, 1.

MUNICIPAL CORPORATIONS, 5.

VERDICT, 8.

CRIMINAL LAW, 15, 19, 20.

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PRESUMPTION.

- 1.** OF DEATH FROM ABSENCE. See Estoppel, 2.

PRINCIPAL AND AGENT.

See AGENT.

PROMISSORY NOTE.

1. NOTE PAYABLE IN BANK STOCK: ACTION ON: DEMAND NECESSARY. See Demand, 1.
2. FRAUD: STATEMENT OF VENDOR. A statement not amounting to a warranty, made by the vendor as to the value of the property sold, is to be treated as a mere opinion; and even if such statement is false and intended to deceive, that fact will not defeat recovery upon a note given for the property. *Van Vechten v. Smith*, 173.
3. ——: COLLATERAL AGREEMENT. Where defendant gave his note to plaintiff for two shares of stock, and at the same time gave plaintiff six dollars for which he took plaintiff's due bill for certain property, held that plaintiff's failure to deliver the property named in the due bill was not such a fraud as to avoid a recovery on the note. *Id.*
4. EVIDENCE: PAROL NOT ADMISSIBLE. Parol testimony that a promissory note was to be paid only out of commissions to be earned by the payer as agent of the payee, held not admissible to contravene the terms of the note in a suit thereon. *Id.*
5. CONTRACT ILLEGAL: PARTIES NOT EQUALLY GUILTY. The board of directors of a district township, in violation of law, loaned the funds of the district to C., who gave to the district township his promissory note therefor with three others as sureties. In an action by the district township on the note against principal and sureties, held that the plaintiff was guilty of no illegal act, though its officers and the defendants were, and that plaintiff could recover alike as against principal and sureties. *District Township of Pleasant Valley v. Calvin*, 189.
6. TIME OF PAYMENT UNCERTAIN: NOT NEGOTIABLE. When an instrument is not certain, or is not capable of being made certain, as to the time of payment, the law does not regard it as negotiable paper. *Woodbury, Williams & English v. Roberts*, 348.
7. BLANK AS TO AMOUNT: NOT GOOD IN LAW. The figures on the margin or at the head of a note are no part of it, but a mere memorandum; and there can be no recovery at law on a note which fails to state in the body of it the amount for which it is given. *Hollen v. Davis*, 444.

8. AVOIDED BY INNOCENT ALTERATION: NEW ACTION FOR ORIGINAL CONSIDERATION: RETURN OF VOID NOTE: FORMER ADJUDICATION. Where in an action on a promissory note, the defendant alleges as his defense that the note was *fraudulently* altered in a material point after delivery without the knowledge or consent of the maker, *held*:
- 1st. That the material alteration, though innocently made, was sufficient to avoid the note, and that the allegation of fraud was neither necessary nor material.
 - 2d. That a general verdict and judgment for defendant on the issue made by such answer were not an adjudication that the alteration of the note was *fraudulently* made.
 - 3d. That such verdict and judgment were not a bar to a subsequent action for the consideration for which the note was given.
 - 4th. That such subsequent suit could be maintained without returning or offering to return the void note. *Eckert & Williams v. Picket*, 545.
9. GUARANTY: WAIVER OF NOTICE. In this case the defendants guaranteed the note in question, waiving notice and protest (see 52 Iowa, 392), and it was error for the court below to instruct the jury that defendants should have had notice of the default of the maker, and that plaintiff could not recover, except upon proof that defendants had suffered no injury or prejudice from want of notice. *Star Wagon Co. v. Sweezy, Lebo & Co.*, 609.
10. _____: BY MEMBER OF DISSOLVED FIRM. Where a firm was under obligation to execute a guaranty, and one of the members thereof, after the dissolution of the firm, executed it, *held* that the other members of the firm were bound thereby, and that they should not have been permitted to testify that the guaranty was not authorized by them. See 52 Iowa, 391. *Id.*
11. UNCERTAINTY AS TO AMOUNT: NEGOTIABILITY. The note in question was given for a corn crusher, and contained a provision that the "payee or his indorsee has full power to declare this note due and take full possession of said property at any time they may deem themselves insecure, even before the maturity of this note, and sell the same where this note is payable, on five days notice in writing;" *held* that this provision rendered uncertain the amount which might be recovered on the note, and that the note was, therefore, not a negotiable note, and that a defense which would have been good as against the original payee was good against his indorsee. *Smith v. Marland*, 645.
12. CONSIDERATION: AGREEMENT FOR EXTENSION OF TIME. Where defendant's father was indebted to the plaintiffs on a promissory note which was about to fall due, and defendant, in consideration of a six months' extension of time on the original debt, made his own note therefor payable six months from date, *held* that the agreement to extend the time was sufficient consideration to support the new note. It was not material that the extension of time was agreed upon and made without the concurrence or request of the father. *Atherton & Ricker v. Marcy*, 650.

See PARTNERSHIP, 1.

AGENCY, 5.

EVIDENCE, 3.

MECHANIC'S LIENS, 3.

SCHOOL DISTRICTS, 4, 5.

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RAILROADS.

1. EVIDENCE: SOUND OF RUNNING TRAIN AS PROOF OF SPEED. Where there was a question as to the speed at which the train was running by which the plaintiff's horses were killed, *held* that it was proper to allow witnesses to testify that they judged from the sound of the train that it was running very rapidly, and more than six miles per hour. The weight of such evidence it was for the jury, under the circumstances shown, to determine. *Van Horn v. B., C. R. & N. R'y Co.*, 33.
2. ——: CONTRIBUTORY NEGLIGENCE: HORSES ILLEGALLY RUNNING AT LARGE. Where a person owning horses in a city allowed them to run at large at night, and to lie down and sleep on a railroad track, and the horses were injured by a passing train, his conduct was a circumstance tending to show him guilty of contributory negligence, unless he had a legal right to let them run at large; and when an ordinance of the city was offered in evidence to show that he had no such legal right, it was error to exclude it. *Id.*
3. INJURY BY CO-EMPLOYEE: RULE STATED. To entitle an employee of a railroad company to recover for personal injuries inflicted through the negligence of a co-employee, it must be shown that his employment was connected with the operation of the railway. Code, § 1307. *Smith v. B., C. R. & N. R. Co.*, 78.
4. ——: RULE APPLIED. Where plaintiff's petition failed to aver, and the evidence failed to show, that he was anything more than a section hand, and that, when injured, he was engaged in loading a car, *held* that this service did not pertain to the operation of the road, and that he could not recover for injury caused by the negligence of his co-employee. *Id.*
5. LEGISLATIVE REGULATION OF RATES: INTER-STATE COMMERCE: CONSTITUTIONAL LAW. If the language of chapter 68, laws of 1874, is to be construed so as to include contracts for the transportation of freights to points without the State, then it is repugnant to Article 1, Section 8, of the Constitution of the United States, which confers upon Congress the "power to regulate commerce with foreign nations and between the States," and is then for that reason, in that particular, void, and will not support an action brought to recover of the defendant freights charged in excess of the rates provided in that act, on goods shipped from Ackley, in this State, to Chicago, in the State of Illinois, on a contract for through shipment at a given rate per car load. *Carton & Co. v. Illinois Central R. Co.*, 148.
6. ——: ——: LEX LOCI CONTRACTUS. While it is true that the contracts of shipment set out in this case are entire contracts, and while it may be conceded that the laws of this State enter into and become a part of contracts made within the State, yet this doctrine must be limited to laws which are valid; and since the law relied on, if applicable to these contracts at all, is so far void, it cannot enter into and become a part of those contracts. *BECK, J., dissenting.* *Id.*
7. KILLING STOCK: INSUFFICIENT EVIDENCE. In an action for damages for two bolts killed by a passing train, at the close of the introduction of plaintiff's testimony, the court, on motion of defendant, directed the jury to return a verdict for the defendant, *held* correct, on the ground that the evidence was not sufficient to support a verdict for damages. *DAY and BECK, JJ.*, as to the sufficiency of the evidence, *dissenting.* *Bothwell v. C., M. & St. Paul R. Co.*, 162.

8. **AUTHORITY OF STATION AGENT: QUESTION OF FACT.** The question whether or not the station agent of a railway company has, as such agent, authority to bind the company by a contract to furnish cars to a shipper at his station at a particular time, is one of fact and not of law, and it was error, *first*, to reject testimony offered by defendant to prove that its agent had not such authority, and *second*, to instruct the jury on the theory that such agents have such authority as matter of law. *BECK, J., dissenting. Wood v. C. M. & St. P. R. Co.*, 196.
9. **NOTICE OF DAMAGE TO STOCK: MISNOMER OF DEFENDANT.** Where horses were killed by the *Central Iowa Railway Company*, and the owner of the horses caused to be served on a proper officer of that company a notice of the injury, as contemplated by section 1289 of the Code, which notice was, however, addressed to the *Iowa Central Railway Company*, held, in an action for double damages, that the misnomer did not invalidate the notice, under the rule that "the omission, alteration or transposition of any of the words, if the words in the name used are synonymous with the true name of the corporation, is not a misnomer that will defeat the notice." *ADAMS, J. dissenting. Martin v. C. I. R. Co.*, 411.
10. **INSTRUCTION: NOTICE OF DAMAGE: INTENTION.** An instruction to the effect that the notice was good, if plaintiff intended to serve it upon the defendant and the misnomer was a mistake, but that, if plaintiff intended to serve it on some other company, defendant was not liable for double damages, held correct. *Id.*
11. **EVIDENCE: RELEVANCY.** The pleadings in a former action against defendant held properly admitted in evidence as showing that defendant became the owner of the railway before the killing of plaintiff's horses—that being a point in issue. *Id.*
12. **TORTS OF EMPLOYEE AS AFFECTED BY HIS PURPOSE.** The act of an employee of a railroad company in removing a trespasser from a train, cannot be considered the act of the company, unless he was employed generally to remove trespassers, or specifically to remove the particular trespasser. The question whether or not it was the *purpose* of the employee to serve his employer is relevant only in cases of willful injury done in the course of his employment. *Marion v. C. R. I. & P. R. Co.*, 428.
13. **RIGHT OF WAY: MEASURE OF DAMAGES.** In estimating the damages which the owner of the land should recover on account of the appropriation of a portion thereof for right of way of a railroad, the benefits caused to the land by drainage from the building of the railroad cannot be considered. Section 18, Article 1, of the Constitution, excludes the consideration of *all* advantages that may result to the owner on account of the improvement. *Britton v. D. M., O. & S. R. Co.*, 540.
14. ____: _____. On an appeal from the award of a jury for damages for right of way, where the question was much longer than necessary, but asked, in substance, how much less the land was worth after than before the appropriation, excluding the benefits, held not erroneous. *Id.*
15. **SURMOUNTING LEGAL IMPEDIMENTS THROUGH AUXILIARY COMPANY: NO FRAUD.** Though a railroad company may not for some reason have the legal authority to condemn right of way for a lateral line, it may cause another company of its own stockholders to be so organized as to have that power, and when such subsidiary company has condemned the right of way, it may lease its line to the former company, and in this there will be no fraud upon those whose lands have been condemned. *Lower v. C. B. & Q. R. Co.*, 563.

16. **CONDEMNATION OF RIGHT OF WAY FOR: DESCRIPTIONS IN NOTICES.** Where notices of condemnation described the land to be condemned as a certain number of feet on each side of the center line of the railroad, "as the same is located, staked, and marked," held that this description was sufficient, and if any other parts of the description in this case differed therefrom, they must yield thereto. *Id.*
17. **EMINENT DOMAIN: LATERAL LINES: STATUTE CONSTRUED.** When a company has the power to build an additional lateral road, that is, a lateral road whose construction and maintenance are possible only upon an independent right of way, the right of way statute does not prevent the condemnation of land for such additional road. *Id.*
18. **NEGLIGENT CONSTRUCTION: EVIDENCE OF PRIOR ACCIDENT.** In an action for damages for injury to a horse by reason of the negligent and defective construction of a railroad crossing, evidence of a former and similar accident, which happened to another at the same place, was not competent, and should have been excluded. *Hudson v. C. & N. W. R. Co.*, 581.
19. ——: **EVIDENCE OF REPAIRING DEFECT AFTER ACCIDENT.** Evidence to the effect that, a day or two after the accident, the defendant's employes changed the crossing in such a manner as to avoid the defect complained of, could have no other purpose than to establish an admission on the part of the defendant of its own negligence at the time of the accident; and the evidence could not be admitted for that purpose, without a violation of the well established rule, that an admission made by an employe or agent, after the transaction, cannot be introduced as evidence against his principal. *Id.*
20. **RIGHT OF WAY: EVIDENCE.** In an action for compensation for land appropriated by a railway for right of way, evidence relating to the manner in which the railway affected the farm, how it affected a hog pasture and a stream of water and access thereto, the size of the stream, the value of the farm and of the farms in that neighborhood, the height of the grade and the depth of the ditches, etc., was properly admitted. *Dreher v. I. S. W. R. Co.*, 599.
21. ——: **INSTRUCTION.** The court instructed the jury that they might "consider the fact that this strip of land is taken for the purpose of building and operating a railroad thereon, and any inconvenience, or apprehension of danger, if any, which may arise out of this peculiar use * * *." Held that the jury could not have been misled by the use of the term "apprehension," since the whole tenor of the instruction was to the effect that actual damages alone were to be allowed; and the small amount of the verdict in this case indicates that they were not misled. *Id.*
22. **RATE OF SPEED: VERDICT: EVIDENCE TO SUPPORT.** Since it appears from the evidence in this case that the accident to plaintiff's horse, for which he seeks to recover, may have been occasioned by defendant's train entering upon the depot grounds at the unlawful rate of more than eight miles per hour, notwithstanding the fact that the train had slowed down to a speed of less than eight miles per hour before the animal came upon the track, and the evidence is thus susceptible of a construction consistent with the verdict, the verdict will not be set aside as not being supported by the evidence. *Miller v. C. & N. W. R. Co.*, 707.
23. **INJURY TO STOCK RUNNING AT LARGE: CONTRIBUTORY NEGLIGENCE.** An instruction in the following language: "If the plaintiff knowingly allowed his horse to be upon and to frequent the depot and station grounds of defendant where it was not required to fence, and where there was danger of the horse being struck by the trains of defendant,

he is guilty of contributory negligence, and cannot recover in this action, *held*, properly refused. (*Kuhn v. C., R. I. & P. R. Co.*, 42 Iowa, 420.) *Id.*

- 24. INJURY TO STOCK ON DEPOT GROUNDS: DOUBLE DAMAGES: STATUTE CONSTRUED.** A statute ought not to be so construed as to create or authorize the recovery of a penalty, unless the intention to do so is clear. Consequently, the latter part of § 1289 of the Code, making railroads liable under said section for the operating of trains in depot grounds at a greater rate of speed than eight miles per hour, being susceptible of a different construction, will not be construed so as to authorize the recovery of double damages for injuries to stock caused by a violation of said statute. *Id.*

See EVIDENCE, 7, 8.

TORTS, 4.

RECEIPT.

- 1. EXPLAINED BY PAROL.** See Evidence, 11.

RECEIVER.

- 1. MORTGAGE OF CHATTELS: FORECLOSURE.** The mortgagee of a stock of dry goods and notions, whose debt was not due, had taken possession of the mortgaged property under his mortgage, which provided that he "might take possession whenever he should choose to do so, and sell the goods at public auction, or so much thereof as should be sufficient to pay the amount due, or to become due, as the case might be, with all reasonable costs pertaining to the keeping, advertising and selling the said property, and had been garnished by creditors of the mortgagor, and had brought his action in equity to foreclose the mortgage: *held* that under Code, § 2903, he was entitled to have a receiver appointed to take possession of the goods and to sell them in the ordinary course of business. *Maish v. Bird*, 307.
- 2. APPOINTMENT OF: NOTICE.** Under section 2903 of the Code, where the adverse party is not within the jurisdiction of the court, and cannot be served or cannot readily be served with notice, the court may, under some circumstances, appoint a receiver without notice, and an appointment so made in this case was approved. *Id.*
- 3. APPOINTMENT OF: EVIDENCE CONSIDERED AND STATUTE APPLIED.** Upon consideration of the evidence in this case, it was *held* that defendants were not entitled to have a receiver appointed, because they did not show that the property in controversy, or its rents and profits, was "in danger of being lost or materially injured or impaired," as required by section 2903 of the Code. *Sleeper v. Iselin & Co.*, 379.

REDEMPTION.

- 1. FROM MORTGAGE: BY PURCHASER UNDER JUNIOR JUDGMENT.** The plaintiff was an execution purchaser of land on a judgment which was a lien upon the land, subsequent and inferior to defendant's mortgage, which was due, and plaintiff brought this action to redeem from the prior mortgage and to be subrogated to the rights of the mortgagee; *held* that such right to redeem and to be subrogated existed at common law, and that there is nothing in our statute abrogating that right. *Hammond v. Leavitt*, 407.

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2. **BY SURETY: FROM MORTGAGE FORECLOSURE.** Where there has been the foreclosure of a mortgage for the collection of a note secured thereby, a surety on the note, against whom judgment was also rendered in the proceeding, has no right to redeem the mortgaged property from the purchaser at the foreclosure sale. *Miller v. Ayres*, 424.
3. **MORTGAGE FORECLOSURE: "DEFENDANT" DEFINED.** The term "defendant" in our statute concerning redemptions *held* to mean, in the case of a mortgage foreclosure, the mortgagor or person holding the legal, or possibly the equitable, title, subject to the mortgage. *Id.*

See **TAX SALE**, 1, 2, 3, 4, 5, 6, 9, 10, 11.

FRAUDULENT CONVEYANCE, 1.

JUDICIAL SALE, 1.

ESTOPPEL, 5.

REPLEVIN.

See **CONTRACTS**, 9.

PLEADING, 1.

RES ADJUDICATA.

See **FORMER ADJUDICATION**.

ROAD SUPERVISOR.

1. **MISAPPROPRIATION OF TOWNSHIP FUND BY: LIABILITY ON BOND.** Where the township trustees had set apart as a general township fund one half of the taxes levied (Code, §§ 969, 970), which fund it was the duty of the road supervisor to collect and pay over to the township clerk (Code, § 981), but which he in fact expended for bridge materials, *held* a misappropriation of the money, for which he was liable on his official bond. *Wells, Clerk of Washington Township, v. Stomback*, 376.

SALE.

1. **OF PERSONAL PROPERTY: NEGLIGENCE: LIABILITY OF CONSIGNEE.** Where advances are made by the consignee or commission merchant on goods consigned, the consignor cannot direct a sale at his pleasure, but the consignee has the right to sell at such time as he sees proper, to the extent and in payment of his advances. If, however, the consignor orders a sale, and the consignee neglects to sell, not because he has made advances, but because he is negligent, then he cannot protect himself on the ground that he has made advances; but this is a question of fact for the jury. *Butterfield & Co. v. Stephens*, 596.

See **PROMISSORY NOTES**, 2, 8.

CONTRACT, 9.

SCHOOL DIRECTORS.

See **MANDAMUS**, 2, 8.

SCHOOL DISTRICT.

1. **DISTRICT TOWNSHIP: POWER OF ELECTORS TO DISCHARGE DEBTOR.** The electors of a district township can exercise such powers only as are conferred by statute, either expressly or by reasonable implication; and section 1717 of the Code, conferring upon the electors the power "to direct the sale or other disposition to be made of any school-house or site thereof, and of such other property, personal or real, as may belong to the district," does not authorize the directors to discharge a debtor of the district without consideration. *District Township of Washington v. Thomas*, 50.
2. ——: **TERRITORY IN OTHER TOWNSHIP: RIGHT TO TAXES ARISING FROM.** Where one of the subdistricts of a district township embraced territory in another township and county, and taxes for the contingent and teachers' fund had been levied upon such territory and paid into the treasury of the county in which it lay, and the treasurer of such county also held certain money apportioned to said territory out of the temporary school fund of said county, *held* that the money thus in the hands of the treasurer belonged to the district township to which the territory was attached, and for the support of whose school the taxes were levied and paid and the money apportioned, and that the treasurer, refusing to pay said money to said district township upon the proper warrants therefor, could be compelled by *mandamus* to do so. *District Township of Honey Creek v. Floete*, 109.
3. ——: **RESTORATION OF ATTACHED TERRITORY: TAXES EFFECT WHEN: APPORTIONMENT OF FUNDS.** Where there has been an agreement for the restoration to a district township of detached territory, in the absence of a stipulation to the contrary, it will be held to take effect, under section 1796 of the Code, or, if that does not apply, according to the general scope and intent of the school law, on the first Monday of March after the agreement has been entered into; and the taxes collected and moneys appropriated for the support of the school of the detached territory up to the time of the taking effect of the restoration, are payable to the district township which supported the school, notwithstanding the warrants therefor are not presented and payment demanded until after the restoration has been perfected. *Id.*
4. **PROMISSORY NOTE: OFFICIAL SIGNATURES OF SCHOOL OFFICERS: DISTRICT NOT BOUND BY.** Where a note was given to an insurance company for "Policy No. 138,181," and was signed "E. G., president, J. A. secretary, E. S., director," and had nothing else to show that it was the obligation of the school district of which the makers were the officers, *held* that, in a suit thereon against one of the makers individually, he could not escape liability by showing that it was given for insurance upon the school-houses of the district, and that it was intended as the obligation of the district. *American Ins. Co. v. Stratton*, 696.
5. **INSURANCE OF SCHOOL-HOUSES: STATUTE CONSTURED.** Chapter III, acts of 1882, which legalizes all contracts made by school officers for insurance of school buildings, as well as all orders, warrants, and other evidences of indebtedness issued therefor, was not intended to render a district liable for the personal obligation of its officers, such as the note sued on in this case. *Id.*

See PROMISSORY NOTE, 5.

SHERIFF.

1. **ACTION ON BOND OF FOR NEGLIGENCE.** See *Crosby v. Hungerford*, 712.

See EXECUTION, 2.

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SPECIFIC PERFORMANCE.

1. **DELAY IN COMPLYING WITH DECREE.** In a suit for the specific performance of a contract to convey land, where the decree was that the plaintiff should have a deed upon making a cash payment and executing certain notes and a mortgage on the land to secure deferred payments, but no time was fixed when the plaintiff should perform on his part, *held* that his neglecting to do so for nine months would not bar his right to an enforcement of the decree. If the defendants desired an earlier performance, they should have tendered their deed and demanded the money and securities. *Renwick v. Bancroft*, 116.
2. ——: **INTEREST DURING DELAY.** In this case the decree was that plaintiff should pay upon a tender of the deed, and it was *held* that defendants could not demand interest from the date of the contract, but only from the date of their tender of the deed. *Id.*
3. **SUFFICIENT TO COMPLY WITH DECREE.** Nor could defendants object to receiving the notes tendered, on the ground that they were not made payable to the proper parties, since they were at least made in accordance with the decree. *Id.*
4. **DECREE: FORM OF MORTGAGE MADE PURSUANT TO.** Neither can defendants be heard in this court to object to the mortgage tendered by plaintiff on the ground that it was executed by him alone, without showing that he was unmarried, or that it was given for purchase-money, since there is nothing in the record showing that plaintiff was married. This court cannot presume that he was married. *Id.*
5. **EVIDENCE CONSIDERED.** Plaintiff sues for the specific performance of an agreement to convey land, but the testimony failing to show what the agreement really was, *held* that the court erred in decreeing a conveyance as prayed. *Roberts v. Campbell*, 675.

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STATUTE OF LIMITATIONS.

1. WAIVER OF. See Mechanic's Lien. 7.

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STREETS.

1. OBSTRUCTIONS IN CITY STREETS: LIABILITY OF CITY FOR. See Cities and Towns, 5, 6.

2. ——: LIABILITY TO CITY OF PERSONS OBSTRUCTING. See Municipal Corporations, 6.

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SURETY.

1. RELEASE OF BY ABANDONMENT OF LRVY. See Execution, 1.
2. ON BOND OF INSURANCE AGENT: NEGLIGENCE OF COMPANY. The sureties on the bond of an insurance agent, executed to the company for the fidelity of the agent, are not discharged from liability from the mere fact that the agent was continued in the employment of the company after he had failed to make payment promptly, of which fact the sureties were not advised. *Phenix Ins. Co. v. Findley*, 591.

See PROMISSORY NOTE, 5.

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TAXATION.

1. CONSTITUTIONAL LAW: TAXING POWER. The legislature has the power under the constitution to impose a tax upon the property of a toll-bridge company as the property of the corporation, and also to impose a tax on the shares of the corporation stock as the property of the stockholders. *Cook, Ex'r, v. City of Burlington*, 251.
2. EXEMPTION: PROPERTY USED FOR SCHOOL AND CHURCH. In order to exempt real estate from taxation under section 797 of the Code, use and ownership, either legal or equitable, must combine in the same person. In this case, where it appears that the legal title is in a private individual, though the property is used for a school and church, *held* that the property was not exempt. *Laurent v. City of Muscatine*, 404.

See ASSESSMENT, 1, 2, 3.

TAX SALE AND DEED.

1. TAX SALE: REDEMPTION: TIME OF. Redemption may be made from a tax sale at any time within ninety days after the proof of service of the notice required by section 894 of the Code has been filed in the proper office. *Cummings v. Wilson*, 14.
2. — : — : WHO MAY REDEEM. In cases wherein the proper county officers are authorized and required to permit redemption, the courts will allow and enforce the right; and it is the rule in this State that the holder of any right in lands, legal or equitable, perfect or inchoate, may redeem from a tax sale. *Id.*
3. — : — : — : DUTY OF OFFICERS. When one seeks to redeem from a tax sale under an equity or a claim not based upon a recorded title, but which the law provides shall support the right of redemption, the county officers must permit the redemption, if they are satisfied that he in good faith relies upon such equity or claim; but such equity or claim must pertain to an interest in the land, and be such that, if enforced, it will vest some title, lien or right to the property itself. *Id.*
4. — : — : — . In this case, where it appears that the plaintiff was prosecuting his suit to recover the title to the land in controversy, basing his claim upon an equity which, if established, would entitle him to the relief he sought, *held* that he was entitled to redeem from a sale of the land for taxes. *Id.*
5. REDEMPTION BY MINOR. Real estate, sold for taxes under section 779 of the Revision, must be redeemed before the expiration of three years from the date of the sale, that is, the time when the property is struck off to

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- the bidder; and if the property belonged to an adult at that time, the time of redemption cannot, under the provision of said section, be extended in favor of a minor who should acquire title to the property, either by conveyance or descent, before the expiration of the three years. *Stevens v. Cassidy*, 113.
6. **CONFLICTING CLAIMS TO LAND: RECOVERY OF MONEY PAID TO REDEEM.** Where defendant was the owner of land, subject to a vendor's lien, of which he had notice, but which was not a personal demand against him, and he allowed the land to be sold for taxes and afterwards to be sold on special execution in satisfaction of the vendor's lien, and the holder of the vendor's lien became the purchaser at the execution sale, and afterwards redeemed the land from the tax sales, *held* that he could not maintain an action against the defendant to recover the money paid by him to redeem from the tax sales. *Barr v. Patrick*, 134.
7. **FRAUD: EVIDENCE.** Proof that there were three bidders at a tax sale, and that they did not bid one against another, is not sufficient evidence to establish a fraudulent combination among them. *Beeson v. Johns*, 166.
8. **TAX DEED: TENANT IN COMMON.** A tax deed acquired by a tenant in common is not sufficient in equity to divest the interest of a co-tenant, notwithstanding the holder of the deed may have acquired the tax certificate before he became tenant in common, following *Flinn v. McKinley*, 44 Iowa, 68. *Tice v. Derby*, 812.
9. **VOID TAX SALE: REMEDY OF OWNER REDEEMING FROM: LIABILITY OF COUNTY.** Where an owner of land redeems the same from a void tax sale—void because the tax for which the sale was made has been twice paid, once voluntarily, and once by a previous sale of the property, he cannot recover from the county the amount paid in redemption. The sale, being utterly void, did not imperil his title, and he had no need to redeem. His remedy was to proceed against the holder of the certificate or tax deed to cancel the void transaction. *Sears v. Marshall County*, 603.
10. **TAX SALE: REDEMPTION: ERROR OF TREASURER.** Where the owner of a certificate of purchase of land at tax sale filed in the county treasurer's office, on the 27th day of November, an affidavit of notice to the owner of the land of the expiration of the time of redemption, but the entry on the tax sale register showed that such affidavit was filed on the 29th day of November, *held* that the owner, in the absence of anything to put him on inquiry as to the true date of filing, was justified in relying upon the entry in the register, and was entitled to redeem the land within ninety days from the 29th day of November. *Ellsworth v. Green*, 622.
11. **TAX SALE: SERVICE OF NOTICE TO REDEEM: STATUTE CONSTRUED.** The affidavit required by section 894 of the Code, to perfect the service of the notice therein prescribed of the expiration of the time for the redemption of land sold for taxes, must be signed and verified by the holder of the certificate of purchase, his agent or attorney. An affidavit made by one of the proprietors of the paper in which the notice was published, *held* insufficient to cut off the right of redemption. *American Missionary Association v. Smith*, 704.

See ASSESSMENT, 2.

TENANT.

1. TENANCY AT WILL. See **Forcible Entry and Detainer**.
2. TENANCY IN COMMON. See **Tax Sale and Deed**, 8.

TORTS.

1. ASSAULT AND BATTERY: PROVOCATION TO MITIGATE DAMAGES. In an action for damages for assault and battery, it is the settled rule of this State that provocation given at the time of the assault, or within a prior time so recent as to justify the presumption that the offense was committed under the influence of passion excited thereby, may be shown in mitigation of damages; but if time for reflection intervened (one day in this case) after the provocation, it will not extenuate the violence. *Gronan v. Kukkuck*, 18.
2. ——: PLEADING: MENTAL PAIN. As mental pain is the natural and inevitable result of personal injuries, damages therefor need not be specifically claimed in a petition in a cause for assault and battery. *Id.*
3. MITIGATION OF DAMAGES. It is no ground for mitigation of damages for an assault and battery that the plaintiff denied making statements derogatory to the character of defendant, whereby defendant was greatly provoked. *Id.*
4. RAILROADS: LIABILITY OF ONE JOINT WRONG-DOER TO ANOTHER. While it is a general rule that no contribution can be enforced as between joint wrong-doers, there are some exceptions to the rule; and where defendant wrongfully removed a gate which plaintiff had erected to keep live stock off its right of way over defendant's land, whereby the horse of a third party got upon plaintiff's track and was killed by a passing train, and plaintiff, on account of its negligence in not having the gate replaced, was compelled to pay the value of the horse to the owner thereof, held that plaintiff was entitled to recover of the defendant the amount so paid for the horse. *C. & N. W. R'y Co. v. Dunn*, 619.

See **RAILROADS**, 12.

TOWNSHIP.

1. CANNOT SUE. A township has no legal capacity to sue:—Following *Township of West Bend v. Munch*, 52 Iowa, 132; *Wells, Clerk of Washington Township v. Stomback*, 376.

TOWNSHIP CLERK.

1. RIGHT TO SUE ON ROAD SUPERVISOR'S BOND. The township clerk being entitled to the possession of the money belonging to the general township fund (section 981 of the Code), he has the right to maintain an action for the recovery of such money on the bond of a road supervisor. *Wells, Clerk of Washington Township, v. Stomback*, 376.

TOWNSHIP TRUSTEES.

See **PAUPER**, 1, 5.

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TRIAL DE NOVO.

1. PRACTICE IN SUPREME COURT: CERTIFICATE OF EVIDENCE WITHOUT DATE. To authorize a trial *de novo* in this court, the judge of the court below must have certified the evidence at the trial term, or during the following vacation, under Code, § 2472, or within the six months allowed for appeal, under chapter 35, section 1, laws of 1882; and when the abstract shows the certificate of the judge, which is without date or other indication as to when it was executed, and the appellant does not aver that it was executed within the time prescribed by law, a trial *de novo* cannot be had in this court. *Mitchell v. Laub*, 36.

See PRACTICE IN SUPREME COURT, 6, 8, 42.

TRUSTEE.

1. RIGHT TO ACQUIRE TRUST PROPERTY. See Administrator, 1, 2, 3.

See AGENCY, 1.

VENDOR AND VENDEE.

1. FRAUD: VENDOR BY QUIT-CLAIM LIABLE FOR. A vendor who induces his vendee to purchase land by falsely and fraudulently representing that the title is perfect, is liable to the vendee for such fraud, even though the contract of purchase provided for, and the sale was consummated by, a quit-claim deed only. *Ballou v. Lucas*, *Adm'x*, 22.
2. COVENANTS OF WARRANTY: LIABILITY OF VENDOR: MEASURE OF DAMAGES. In this case, the defendant conveyed to one S., with the usual covenants of warranty, certain land to which it had no title. S. afterwards mortgaged the land to the plaintiff to secure the payment of certain notes, the mortgage containing the following recital: "The intention being hereby to convey an absolute title in fee simple." S. afterwards conveyed the land to J. C., subject to the mortgage to plaintiff, and J. C. afterwards conveyed to M. C., who perfected her title by securing a conveyance from the real owner, the amount paid by her therefor not appearing. Plaintiff herein sues the defendant upon the breach of its covenants of warranty, to recover the amount due on his mortgage notes, but the court held that neither S. (the original grantee) nor any one holding under her, could buy in the paramount title, and recover of the defendant more than the amount paid therefor, with interest; and that she could not, by her mortgage to plaintiff, have conveyed to him any greater rights against defendant than she herself possessed; and since it does not appear how much M. C. paid for the paramount title, plaintiff is entitled upon the record to only nominal damages. *Snell v. Iowa Homestead Co.*, 701.

VENDOR'S LIEN.

See TAX SALE, 6.

VENUE.

1. CHANGE OF ON PETITION FOR NEW TRIAL. See New Trial, 2.
2. APPEAL: FROM ORDER CHANGING PLACE OF TRIAL. While this court has held (see cases cited) that an appeal will not lie from an order changing the place of trial, yet when, as in this case, such a motion is made, and by mutual understanding is treated by counsel and by the

court below as a demurrer involving the merits of the case, it will be so treated here, and the appeal will be entertained. *Lucas County v. Wilson*, 354.

3. **IN ACTION ON APPEARANCE BOND.** Where a bond was given for the appearance of the defendant in a criminal action in the court of a certain county, and the place of trial was afterwards changed to the court of another county, *held* that an action on such bond must be brought in the latter court, and that it was error for the latter court to sustain a motion for change of venue to the former court:—Following *Decatur County v. Maxwell*, 26 Iowa, 398. *Id.*
4. **CHANGE OF: "NEXT NEAREST JUSTICE."** When a justice of the peace grants a change of venue, he must send the papers to the "next nearest justice," and must designate by name who the next nearest justice is. Until he does this, he retains jurisdiction of the cause, and no other magistrate to whom the papers may be taken can acquire jurisdiction. *Bremner v. Hallowell*, 433.
5. **ACTION FOR SPECIFIC PERSONAL PROPERTY: STATUTES CONSTRUED.** An action for specific personal property may be brought, under section 3225 of the Code, in any county in which the property or some part thereof is situated; and when such an action was dismissed as to the defendant residing in the county in which the action was begun and the property situated, the other defendants, who resided in another county, were not entitled to have it dismissed as to them. Section 2587 of the Code, does not apply to such a case, but only to actions purely personal. *Porter v. Dalhoff & Co.*, 459.
6. **SECOND CHANGE OF: STATUTE CONSTRUED.** Where, upon the application of defendants, a change of venue was granted from the Circuit to the District Court, *held* that it was error for the District Court to grant another change of venue on the application of plaintiff, in the absence of a showing that the cause on which plaintiff based his application was not in *existence* when the first change was granted. It was not a compliance with section 2591 of the Code for the plaintiff to allege that the cause on which the application was based came to his knowledge since the last continuance. The statute must be strictly complied with. *Michaels v. Crabtree*, 815.
7. **EXCEPTION TO ORDER OF CHANGE: APPEAL TO SUPREME COURT.** Where an erroneous order was made by the District Court, against the defendants' objection, changing the venue to the Circuit Court, and defendants duly excepted thereto, they did not waive their exception by going to trial in the Circuit Court, and by failing to raise the question again in the Circuit Court on a motion for a new trial or in arrest of judgment. The only way to reach the error was to take the proper exception and appeal from the final judgment. *Id.*

See PRACTICE IN SUPREME COURT, 2.

VERDICT.

1. **SPECIAL VERDICT: JUDGMENT ON: POWER OF COURT TO RENDER.** A court cannot properly render judgment for plaintiff on a special verdict alone, unless, taken in connection with the pleadings, it is such as to show conclusively that the plaintiff was entitled to recover; and upon the application of this rule to the facts of this cause, *held* that the judgment upon the special verdict was improperly rendered. *Crouch v. Deremore*, 43.

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2. **PRACTICE: STATUTE CONSTRUED.** Under section 2808 of the Code, the jury, in their discretion, may render a general or special verdict; but it is error for the court, against the defendant's objections, to direct the jury to render a special verdict only. *Schultz, Adm'r, v. Cremer*, 182.
3. **SPECIAL: JUDGMENT ON.** In this case the court held that the claim was barred, and hence directed the jury to find a general verdict for the defendant, but the jury was also required to answer certain special interrogatories, and the answers given, so far as they went, were favorable to plaintiff, but to one question vital to the defense the jury answered "we do not know." Held that, although the court erred in holding the claim barred, yet plaintiff was not entitled to judgment in this court on the special verdict, but only to a new trial in the court below. *Pettus v. Farrell, Adm'r*, 296.
4. **BASTARDY: EVIDENCE TO SUPPORT.** This court cannot say that the court below erred in refusing to set aside the verdict of a jury in a bastardy case, where a similar verdict had been found on a former trial, and where nothing appears to indicate that the jury was influenced by passion or prejudice, notwithstanding the preponderance of the evidence may have been in favor of the defendant. *State v. Quinton*, 362.
5. ———: **JURY: MISCONDUCT OF: EVIDENCE OF.** An affidavit of an attorney in a bastardy case to the effect that certain members of the jury told him that, in arriving at their verdict, they considered the resemblance between the child, which was in court but not in evidence, and the defendant, is hearsay evidence, and is not to be considered. *Id.*
6. **SPECIAL INTERROGATORIES: MODE OF ANSWER.** Where special interrogatories were submitted to the jury, and the court directed the jury that, if they could not answer the questions by "yes" or "no," they might answer them in some other manner, and the jury answered "we think" and "have reason to believe," held that these answers presented in positive language the conclusions reached by the jury, and sufficiently expressed the findings of fact sought by the questions. *Martin v. C. I. R. Co.*, 411.
7. **EVIDENCE TO SUPPORT.** The evidence being conflicting this court will not reverse the judgment on the ground that the verdict is not supported by the evidence. *Fuhs v. Osweiler*, 431.
8. ———. Where there is some evidence to support a verdict, it will not be set aside in this court as being without support. *Crosby v. Hungerford*, 712.
9. **EVIDENCE TO SUPPORT.** See Appeal, 5.

See JURY, 1, 2.

RAILROADS, 22.

WAIVER.

See EXCEPTIONS, 1.

MECHANIC'S LIEN, 7.

PROMISSORY NOTE, 9.

WARRANTY.

1. COVENANTS OF. See Vendor and Vendee, 2.

WITNESSES.

1. FEES OF IN CRIMINAL CASES: BY WHOM PAID. Section 3818 of Miller's Code (chapter 207, Laws of 1880), provides that witnesses for the defense shall not in any criminal case be subpoenaed at the expense of the county, except upon order of the court or judge before whom the case is pending. The section applied to cases in all the courts of the State, including courts held by justices of the peace; and being a later expression of the legislative power than section 3814 of the Code, it must be construed as limiting the payment provided by the latter section to such of the defendant's witnesses as are subpoenaed after the proper order has been made. *Kennedy v. Delaware County*, 123.
2. NUMBER OF LIMITED: DISCRETION OF COURT. The trial court has a legal discretion to limit the number of witnesses that may be examined to establish a single point or proposition; and *held* that such discretion was not abused by the court in this case. BECK and ADAMS, JJ., dissenting. *Everett v. U. P. R. Co.*, 243.
3. EXAMINATION OF. See Practice, 9, 17.
4. IMPEACHMENT OF. See Evidence, 16.

WRIT OF ERROR.

See PRACTICE, 19.

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